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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

THE STATE OF COLORADO,
Petitioner,
vs.
PHILIP LESLIE GALIMANIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

On Certiorari to the Colorado Court of Appeals
Court of Appeals No. 84CA0809

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *Wainwright v. Greenfield*, 474 U.S. 284 (1985), allows use of a defendant's request for counsel to rebut evidence offered in support of an insanity defense?

2. Whether mention of a defendant's invocation of silence in the sanity portion of a bifurcated proceeding constituted harmless error where the prosecution made no reference to this invocation in closing argument, where there was other substantial evidence of sanity, and where the invocation could not be used to establish guilt?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 3

FACTUAL BACKGROUND 4

STATE COURT PROCEEDINGS 6

REASONS FOR GRANTING THE WRIT .. 8

A. A DEFENDANT'S REQUEST FOR COUNSEL IS ADMISSIBLE TO REBUT EVIDENCE OF INSANITY. 9

B. THE BIFURCATED NATURE OF THE PROCEEDINGS RENDERED HARMLESS REFERENCES TO DEFENDANT'S SILENCE. 12

CONCLUSION 15

APPENDIX A 17

APPENDIX B 33

PAGE

APPENDIX C 37

APPENDIX D 39

APPENDIX E 41

APPENDIX F 47

APPENDIX G 51

APPENDIX H 53

TABLE OF AUTHORITIES

CASES **PAGE**

Commonwealth v. Hunsberger, 523 Pa. 92, 565 A.2d 152 (1989), *cert. denied*, 107 L. Ed. 2d 1030 (1990) 9, 11, 12, 15

Doyle v. Ohio, 426 U.S. 610 (1976) 10, 11, 14

Greenfield v. Wainwright, 741 F.2d 329, 330-331 (11th Cir. 1984) 11

Miranda v. Arizona, 384 U.S. 436 (1966) 9, 12

New York v. Quarles, 467 U.S. 649 (1984) 12

Nichols v. Wainwright, 783 F.2d 1540, 1543, n.2 at 1543 (11th Cir. 1986) 11

People v. Galimanis, 765 P.2d 644 (Colo. App. 1988) 1-3, 9-11, 13-15

Trujillo v. People, 150 Colo. 235, 372 P.2d 86 (1962) 14

Wainwright v. Greenfield, 474 U.S. 284 (1985) . . . . . i, 3, 8-15

STATUTES **PAGE**

28 U.S.C. Section 1257 (1988) 3

Ariz. Rev. Stat. Ann. § 13-3988 (1988) 9

Ark. Stat. Ann. § 16-86-101 (1987) 9

Cal. Penal Code § 1026 (West, 1978) 9

Colo. Rev. Stat. § 16-8-104 (1986) 1, 9

D.C. Code Ann. § 22-2401 (1981) 9

Ga. Code Ann. § 17-7-130 (Miche, 1987) 9

Mass. Const. PT,I Art. XII (1978) 9

Me. Rev. Stat. Ann. tit. 17, § 40 (1978) 9

N.H. Rev. Stat. Ann. § 628.2 (1984) 9

N.J. Stat. Ann. § 2C:4-1 (1978) 9

Ohio Rev. Code Ann. § 2903.01 (1990) 9

S.D. Codified Laws Ann. § 23A-10 (Rule 12.2) (1988) 9

Tex. Code Crim. Proc. Ann. art. 26.13 (Vernon 1989) 9

Wis. Stat. § 971.14 (1982) 9

RULES **PAGE**

Sup. Ct. R. 17.1(b) and (c) 3

OTHER AUTHORITIES **PAGE**

Amendment V of the United States Constitution 3

Amendment VI of the United States Constitution 3

Amendment XIV, Section 1 of the United States Constitution 3

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OPINION BELOW

The Colorado Court of Appeals reversed a jury determination which found respondent Galimanis sane at the time he beat, stabbed, and decapitated Cynthia McQueen on the night of April 19-20, 1983. This opinion, attached as Appendix A, is published as *People v. Galimanis*, 765 P.2d 644 (Colo. App. 1988). It represents a decision by two members of a three judge panel, and it overturned the sanity portion of a bifurcated proceeding.[1]

[1]Colo. Rev. Stat. § 16-8-104 (1986) provides as follows:

Separate trial of issues: The issues

It upheld the guilt-innocence portion in which respondent was convicted of first degree murder but left the validity of this conviction contingent upon the outcome of a new sanity proceeding. One dissenting judge would have upheld both of these proceedings. *Galimanis, supra,* Metzger, J. concurring and dissenting.

Petitioner then sought certiorari from the Colorado Supreme Court, and certiorari was granted in July, 1989 (*see* Amended Order of Court attached as Appendix B). However, after receiving briefs and hearing oral argument, the Colorado Supreme Court declined to issue an opinion. Instead, on February 19, 1991, it denied certiorari as having been improvidently granted (*see* Order of Court attached as Appendix C). Petitioner timely sought rehearing in the Colorado Supreme Court and rehearing was denied on March 11, 1991 (*see* Appendix D).

JURISDICTION

In this first degree murder case, the Colorado Court of Appeals overturned a sanity determination because the trial court allowed the prosecution "to present evidence at (the) sanity trial that (respondent) had asserted his constitutional rights after being given a Miranda advisement". *Galimanis, supra,* at 647. The Colorado Court of Appeals did not rely on any independent state ground for its decision. Rather, it based its ruling on this court's decision

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> raised by the plea of not guilty by reason of insanity shall be tried separately to different juries, and the sanity of the defendant shall be tried first.

in *Wainwright v. Greenfield,* 474 U.S. 284 (1985), and held that *Greenfield* "mandates reversal of (respondent's) sanity adjudication." *Galimanis, supra,* at 647.

Because *Greenfield* is based upon an interpretation of the due process clause of the Fourteenth Amendment, certiorari jurisdiction is invoked pursuant to 28 U.S.C. Section 1257 (1988). Moreover, the Colorado Court of Appeals has decided a federal question in a way that conflicts with the decision of another state court of last resort, and its decision involves an important question of federal law which has not been, but should be, decided by this court. Thus, certiorari jurisdiction is also invoked pursuant to Sup. Ct. R. 10.1(b) and (c).

CONSTITUTIONAL PROVISIONS

Amendment V of the United States Constitution provides in pertinent part: "No person ... shall be compelled, in any criminal case, to be a witness against himself...."

Amendment VI of the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense."

Amendment XIV, Section 1 of the United States Constitution provides in pertinent part: "No state shall ... deprive any person of life, liberty, or property without due process of law...."

FACTUAL BACKGROUND

In April of 1983, Cynthia McQueen was a 23 year old mother of two small children. At this time, Cynthia and her two children lived in an apartment in Wheat Ridge, Colorado. Respondent lived in an adjoining apartment. On the evening of April 19, 1983, Cynthia intended to end her relationship with respondent. An altercation occurred in Cynthia's apartment. Respondent subsequently beat Cynthia about the face and stabbed her at least five times before decapitating her with a knife. Cynthia was alive but unconscious when respondent began the process of removing her head. This decapitation took a significant amount of time less than hours but more than a few minutes. It required a manipulation of the head and cervical spine to expose the soft disks which separate the bony vertebrae. Respondent even left "hesitation" marks on one of the vertebral bodies in an apparent attempt to find soft tissues in the vertebral column. Respondent left the knife in the victim's back. His palm print was later found on the knife-handle. Respondent left the corpse and its severed head to be discovered by Cynthia's children.

Respondent's Plymouth Volare was inoperable at this time. However, respondent was seen hurriedly rummaging through the trunk of this vehicle before he later fled in the victim's Ford Maverick. Some 29 hours later, a woman in Denver, Colorado saw respondent sleeping in the Ford Maverick outside her home. She called Denver police. Because the police had previously been informed of Ms. McQueen's murder, they approached respondent with caution in believing that he could be armed and dangerous. The officers drew their weapons, knocked on the car windows, and told respondent to unlock the door. He complied and when officers asked his name, he responded

appropriately.

An officer named Al Keiser then told respondent that he was being arrested for investigation of homicide. Respondent laughed and stated that nobody had anything on him. Officer Keiser then advised respondent of his Miranda rights. Respondent acknowledged that he understood these rights, and Keiser then asked him if he had a gun on his person or in the car. Respondent said that he didn't have a gun and that he wanted to talk to a lawyer.

At this time, respondent wore dark blue jeans with large blood stains. However, there was no blood on his shirt. His hands had been washed since the killing and his dress was appropriate for the outdoor temperature. He was able to recognize media personnel and he ducked down and asked the officers to prohibit picture-taking. He also expressed concern for the victim's car.

Respondent was subsequently transported to the Wheat Ridge Police Department and then to the Jefferson County Jail. Eight different officers had contact with respondent during this time when certain physical evidence was taken from his person and various booking procedures were performed. These officers would later attest to his ability to converse and understand directions.

At the Wheat Ridge police station, Mr. Galimanis was advised of his Miranda rights a second time by Detective David Light. This detective then asked respondent "if he wanted to talk or if he wanted to have a lawyer present." Mr. Galimanis responded by stating: "No, I don't want to talk to you. I want a lawyer." Pertinent portions of the testimony of Officer Keiser and Detective Light at the sanity proceeding are attached as Appendices E and F.

STATE COURT PROCEEDINGS

In raising an insanity defense to a first-degree murder charge, Mr. Galimanis indicated that he would be relying heavily on lay testimony of his actions, words, and conduct as proof of insanity. On August 2, 10, and 12, 1983, he filed witness lists indicating that he would be presenting extensive evidence of his demeanor, including a description of his behavior while in police custody on a previous arrest. Included on these witness lists were six persons including his sister, all of whom would testify regarding his demeanor during the months preceding his murder of Cynthia McQueen. A state patrolman was also included on this witness list. This officer would later testify to respondent's behavior after an arrest for drunk-driving on March 4, 1983, approximately 6 weeks before the murder of Cynthia McQueen.

On August 15, 1983, the prosecution filed a motion to allow testimony describing defendant's assertions of his Miranda rights. In resolving respondent's opposition to this motion, the district court held as follows:

> [i]n a sanity trial all actions, words, conduct of the defendant are certainly relevant to the determination of the jury of sanity or insanity at the time of the events and I think whatever inferences the jury wishes to draw from his statements at the time he was arrested are certainly proper, and therefore, that motion of the prosecution is granted.

The sanity trial then began on August 22, 1983. Respondent called several lay witnesses who described his conduct, actions, and words prior to the murder of Ms.

McQueen. Respondent also elicited how a deputy sheriff called by the prosecution noted "suicidal ideation" on a written form completed a few hours after respondent's arrest and how this same officer recommended counseling for him. Respondent also called three psychiatrists and three psychologists in support of his insanity claim. During extensive cross-examination of two such experts, there was brief reference to respondent's general assertion of rights and to his specific request for a lawyer. Some of the lengthy expert testimony described respondent as a borderline personality who experienced psychotic episodes. Defendant's psychosis was described as "intermittent" or "transient," by some experts and as "latent" by another.

In responding to this claim, the prosecution presented lay testimony of respondent's behavior before the killing. The prosecution also presented the testimony of no less than eight peace officers to establish that defendant's conduct was normal or coherent subsequent to his arrest. The great majority of this testimony involved questions and answers concerning defendant's general ability to understand and follow directions and to converse in a coherent manner. Officer Keiser briefly described how Mr. Galimanis requested a lawyer when he was asked if he had a weapon (*see* Appendix E). Detective Light briefly described how he asked respondent if he wanted to speak or if he wanted a lawyer and how Mr. Galimanis replied by saying that he didn't want to talk and that he wanted a lawyer (*see* Appendix F).

The prosecution also called a psychiatrist, Dr. Wahl, who opined that Mr. Galimanis was sane at the time of the murder. Dr. Wahl testified that respondent's claimed psychosis would not have prevented him from distinguishing right from wrong through the stimulus of his assault on the victim, and the difficult and meticulous decapitation of Ms. McQueen. He also testified that respondent's actions

immediately after the killing, particularly his flight in the victim's car, showed that Mr. Galimanis recognized the wrongfulness of the murder. Dr. Wahl also stated that respondent's request for an attorney when arrested evidenced awareness and control over what he said (*see* Appendix G). Without any prompting from the prosecution, this witness also incorrectly mentioned how respondent had no comment or said "nothing" after his arrest. (*Id.*) In fact, respondent did speak at this time; his remarks concerned media coverage, and the fate of the victim's car (*see* Appendix E).

In closing argument, the prosecution made a single reference to respondent's request for a lawyer, but no references to any invocation of silence (*see* Appendix H). The jury found defendant sane at the time of the killing and an entirely separate jury found him guilty of first-degree murder. The Colorado Court of Appeals overturned the first of these two verdicts.

REASONS FOR GRANTING THE WRIT

The Colorado Court of Appeals decision presents the perfect opportunity for this Court to address an issue which was left unresolved in *Wainwright v. Greenfield*, 474 U.S. 284 (1985), and which is critical to fair and reliable adjudications of claimed defenses of insanity. That issue concerns the prosecution's use of evidence of a defendant's assertion of his right to counsel to determine a later claim of insanity.

The opportunity exists largely because, unlike in

Greenfield, in Colorado (as well as in 13 other states[2]), the issue of one's sanity is determined in a proceeding bifurcated from trial on the issue of one's guilt or innocence -- a fact which greatly diminishes the potential harm connected with any additional reference to the defendant's assertion of his right to remain silent.

A. A DEFENDANT'S REQUEST FOR COUNSEL IS ADMISSIBLE TO REBUT EVIDENCE OF INSANITY.

In *Greenfield,* this court ruled that, because silence should carry no penalty, an accused's assertion of Miranda rights[3] should not be used to rebut a claim of insanity. However, in a concurring opinion, the present Chief Justice drew an important distinction between the right to remain silent and the right to counsel where the issue is sanity, not guilt or innocence. *Greenfield, supra*, Rehnquist J. concurring at 297-299. The Supreme Court of Pennsylvania recognized this distinction. *Commonwealth v. Hunsberger*, 523 Pa. 92, 565 A.2d 152 (1989), *cert. denied*, 107 L. Ed. 2d 1030 (1990). The *Galimanis* court did not.

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[2]Thirteen states and the District of Columbia provide for bifurcated sanity proceedings: Ariz. Rev. Stat. Ann. § 13-3988 (1988); Ark. Stat. Ann. § 16-86-101 (1987); Cal. Penal Code § 1026 (West, 1978); Colo. Rev. Stat. § 16-8-104 (1986); D.C. Code Ann. § 22-2401 (1981); Ga. Code Ann. § 17-7-130 (Miche, 1987); Me. Rev. Stat. Ann. tit. 17, § 40 (1978); Mass. Const. PT,I Art. XII (1978); N.J. Stat. Ann. § 2C:4-1 (1978); N.H. Rev. Stat. Ann. § 628.2 (1984); Ohio Rev. Code Ann. § 2903.01 (1990); S.D. Codified Laws Ann. § 23A-10 (Rule 12.2) (1988); Tex. Code Crim. Proc. Ann. art. 26.13 (Vernon 1989); Wis. Stat. § 971.14 (1982). The State of Florida provided unitary proceedings at the time of trial in *Greenfield.* Thus, the same jury decided both the sanity and guilt/innocence issues in the *Greenfield* case.

[3]See *Miranda v. Arizona*, 384 U.S. 436 (1966).

Galimanis incorrectly bars prosecutors from using relevant evidence, that is, a request for counsel, to rebut demeanor evidence of insanity. Unlike an invocation of silence, a request for counsel "may be highly relevant where the plea is based on insanity". *Greenfield, supra,* Rehnquist, J. concurring at 297. Moreover, unlike *Greenfield*, this case did not involve a prosecutor's comment upon an accused's silence. *See Greenfield, supra,* n.2 at 287. Rather, it only involved a prosecutorial comment upon the exercise of the right to counsel (see Appendix H). Thus, the opinion below incorrectly expands this court's decision in *Greenfield.* It held that *Greenfield* prohibits any use of a defendant's request for counsel, see *Galimanis, supra,* at 648, despite the fact that the constitutional basis for the Greenfield decision is the implicit promise that an accused's *silence* will not be used against him in any proceeding. *See, e.g., Greenfield, supra,* at 290; *Doyle v. Ohio*, 426 U.S. 610 (1976). In this manner, the *Galimanis* opinion places a restriction upon the prosecution which is not warranted by the constitutional analysis used by this court in *Greenfield*, and this restriction precludes the use of evidence which would be highly relevant to rebut claims that an accused's demeanor manifested insanity. *See Greenfield,* Rehnquist, J. concurring.

This case is distinguished from *Greenfield* not only by the bifurcated nature of the trial court proceedings but also by the extent to which respondent Galimanis relied upon demeanor evidence to establish his insanity. Here, respondent endorsed at least six witnesses for the obvious purpose of establishing that his demeanor evidenced insanity. Here, the trial court found that the relevancy of such demeanor evidence -- that is, all actions, words, and conduct -- would allow the prosecution to use respondent's request for counsel and assertion of silence. In contrast, *Greenfield* evidences little or no reliance on demeanor

evidence by the defense. *See Greenfield v. Wainwright*, 741 F.2d 329, 330-331, 334 (11th Cir. 1984). Accordingly, the *Galimanis* opinion erroneously allows defendants to present extensive evidence of unusual actions, words or conduct in support of an insanity plea while denying the prosecution use of what may be the best available evidence to prove an accused's abilities to distinguish right from wrong. *See Greenfield*, Rehnquist J., concurring. *See also Nichols v. Wainwright*, 783 F.2d 1540, 1543, n.2 at 1543 (11th Cir. 1986). (*Greenfield* inapplicable where behavior around time of arrest is presented in support of a defense).[4]

In contrast, the Supreme Court of Pennsylvania recognized that statements concerning the right to counsel may be admitted to rebut a claim of insanity. *Hunsberger*, *supra*. In so doing, the Pennsylvania court properly recognized that *Greenfield*, and *Doyle, supra* preclude an accused's silence from being used against him but that statements concerning his right to counsel may be used to counter an insanity defense. *See Greenfield*, Rehnquist J., concurring.

Here, respondent's statement to Officer Keiser was a request for counsel, not an assertion of the right to remain silent. Moreover, Keiser did not elicit this request through any effort to inquire about the killing of Cynthia McQueen. Rather, he asked Mr. Galimanis if he had a

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[4]The majority in *Greenfield*, suggested that prosecutors use "carefully framed questions" which circumvent the substance of an accused's invocation of silence. *See Greenfield, supra*, at p. 295. However such questioning will not adequately rebut extensive demeanor evidence such as that presented by respondent particularly since he also presented expert testimony that his psychosis was "transient" or "temporary." Accordingly, states should be allowed to rebut allegations that an accused's demeanor evidenced insanity with direct evidence of his statements regarding the right to counsel. *Greenfield, supra*, Rehnquist, J., concurring, *Hunsberger, supra*.

gun, and Galimanis responded that he had no gun and wanted a lawyer. Admission of this invocation of the right to counsel, not silence, did not violate respondent's constitutional rights, particularly given the intention he demonstrated prior to trial to rely on his demeanor as probative of insanity. *See Greenfield,* Rehnquist J. concurring, *Hunsberger, supra.* Indeed, this request for counsel was a spontaneous and unelicited remark which followed a non-investigative question posed to promote safety, not to gather evidence. Such questions and the responses thereto are outside the purview of *Miranda, supra*. See *New York v. Quarles, 467 U.S. 649 (1984)*. In any event, there is surely no implicit promise that a request for counsel made in response to an officer's inquiry about a firearm will not be admitted against the accused in any proceeding. *See Greenfield,* Rehnquist, J. concurring; *Quarles, supra*. Thus, use of respondent's request for counsel and comment thereon did not violate the constitutional interests protected by *Greenfield*.

B. THE BIFURCATED NATURE OF THE PROCEEDINGS RENDERED HARMLESS REFERENCES TO DEFENDANT'S SILENCE.

This case also presents the novel question of whether the due process interests recognized by *Greenfield* apply to the sanity portion of a bifurcated proceeding in which the trier of fact cannot use silence in a manner prejudicial to the accused. In other words, it involves the unanswered question of whether use of an accused's silence in such a proceeding is necessarily harmless because silence, by virtue of its insoluble ambiguity, will have little on no probative value to the issue of sanity. *See Greenfield,* Rehnquist J. concurring at 297.

Admittedly, Detective Light and Dr. Wahl not only referred to requests for counsel, but also to assertions of the right to silence by Mr. Galimanis. Dr. Wahl's references to respondent's silence were not even elicited by the prosecution and they incorrectly suggested that respondent was silent at the time of arrest when in fact he spoke about media coverage and the victim's car (see Appendices E, G, and H). More importantly, unlike *Greenfield*, this case did not involve prosecutorial comment upon an accused's silence or a jury that determined both guilt and sanity. Rather, it involved a bifurcation of the sanity and guilt proceedings and substantial demeanor evidence of sanity which supported a harmless error claim not made by the state in *Greenfield*. Indeed, this case involved evidence of respondent's actions during and after the victim's death which belied the notion that he was experiencing a psychotic episode during the murder. *Galimanis,* Metzger, J., concurring and dissenting. Similarly, it involved testimony by several police officers that respondent's behavior was normal after his arrest. *Id.* Accordingly, the brief mention of respondent's silence by Light and Wahl before a jury that would not decide guilt was harmless beyond a reasonable doubt given the "insolubly ambiguous" inferences which can be drawn from a defendant saying nothing. *See Greenfield,* Rehnquist J., concurring at 297, 301.

Here, the bifurcation of the guilt and sanity proceedings minimized the prejudice of the brief references to defendant's silence because such silence had minimal probative value to the issue of sanity. Here, Mr. Galimanis' undisputed conduct after stabbing his victim further removed this case from the purview of *Greenfield*, where the prosecution did not raise harmless error. *See Galimanis,* Metzger J., concurring and dissenting at 649-650. In this case, the "meticulous and painstaking decapitation,"

the washing of hands, the donning of a bloodless shirt, the flight in the victim's car, the subsequent concern for this car, the recognition of media personnel, the recognition of a particular police officer, and the ability to understand police directions precluded reversal due to references to silence or to requests for counsel. *Id.; see also Greenfield,* Rehnquist, J., concurring at 301 (brevity of remark reduces prejudice). While respondent's assertion of silence was improperly admitted, the prosecution never argued that this particular assertion was proof of sanity and the Colorado Court of Appeals' refusal to find such error harmless in a bifurcated proceeding stemmed from its "overly mechanistic" application of this court's opinion in *Greenfield. See Galimanis,* Metzger, J., concurring and dissenting at 650.

The bifurcation of guilt and sanity trials protects the accused from prejudice likely to arise in the minds of jurors exposed to the wide variety of evidence which might be admissible on the issue of insanity but which would not be admissible upon the trial of a not guilty plea. *E.g., Trujillo v. People*, 150 Colo. 235, 372 P.2d 86 (1962). Accordingly, the due process concerns which mandated reversal in *Greenfield* should not apply here. This court has deemed silence to be "insolubly ambiguous". *Doyle, supra. Greenfield,* Rehnquist, J., concurring at 297. Thus, the use of silence in a proceeding where guilt is not at issue is of such little consequence that this court should not view such use as an inherently prejudicial violation of the implicit promise that silence will carry no penalty. *See Greenfield,* at 290-291.

Moreover, reversals of sanity proceedings such as the one involved here discourage the use of bifurcated proceedings in which states attempt to safeguard the due process rights of defendants through complete separation of evidence of sanity and evidence of guilt. Accordingly, this court should consider whether the due process concerns of

Greenfield are fully served if state appellate courts decline to recognize how the bifurcation of guilt and sanity proceedings minimizes any prejudice resulting from a *Greenfield* violation. *See Galimanis*, Metzger, J. concurring and dissenting at 640. In any event, this case is readily distinguishable from *Greenfield* by the lack of comment on the exercise of silence, the bifurcation of the proceedings and the substantial evidence that respondent was not psychotic either at the time of the killing or the time of his arrest. *Galimanis*, Metzger, J. concurring and dissenting. Accordingly, any error relating to either silence or request for counsel was harmless beyond a reasonable doubt. *Id.*

CONCLUSION

This case presents an important constitutional question concerning the ability of states to rebut insanity defenses with requests for counsel which prove an accused's cognitive abilities and disprove claims of confusion, incoherence or mental imbalance. *See Greenfield,* Rehnquist J., concurring at 297. This case also illustrates the confusion and conflict relating to the use of statements concerning counsel particularly given this court's denial of certiorari in *Hunsberger*. Accordingly, this case affords an opportunity to develop the law regarding what statements of an accused may be used to rebut demeanor evidence supporting an insanity claim. Similarly, this case will permit this court to consider the due process interests of *Greenfield* in the context of bifurcated proceedings which necessarily minimize the prejudice of a *Greenfield* violation while advancing the due process rights of defendants.

Respectfully submitted,

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APPENDIX A

The PEOPLE of the State of Colorado,
Plaintiff-Appellee,

Philip Leslie GALIMANIS,
Defendant-Appellant.

No. 84CA0809.

Colorado Court of Appeals,
Div. I.

Sept. 22, 1988.
Rehearing Denied Nov. 25, 1988.
Certiorari Pending Jan. 25,1989.

Defendant was convicted in the District Court of Jefferson County, Ruthanne N. Polidori, J., of first-degree murder, motor vehicle theft, and violent crime. Defendant appealed. The Court of Appeals, Pierce, J., held that: (1) trial court did not abuse its discretion in allowing substitution of psychiatrist by ex parte order; (2) psychiatrist's questioning of defendant could continue beyond his expressed reluctance to discuss particular topic without violating defendant's constitutional or statutory privilege against self-incrimination; (3) prosecution should not have been permitted to present evidence at sanity trial that defendant asserted his constitutional rights after being given *Miranda* warnings; and (4) defendant's mother should have been permitted to render opinion regarding defendant's "state of mind" or "mental status" during time prior to murder that he lived with her.

Affirmed in part, reversed and remanded in part. Metzger, J., concurred in part, dissented in part, and filed opinion.

1. Criminal Law -- 633(1)

Ex parte order substituting one courtappointed psychiatrist for another in murder prosecution did not affect defendant's substantial rights, even though hearing on substitution was not held until approximately nine days after substitution was made; defendant was afforded ample opportunity at hearing to present evidence concerning substitution, and nothing in record indicated that he was prejudiced by substitution, although better practice was to afford both parties opportunity to present evidence regarding good cause necessary for substitution before it was made. C.R.S. 16-8-106(1); Rules Crim.Proc., Rule 52(a).

2. Criminal Law -- 633(1)

Trial court did not abuse its discretion in finding that good cause existed for substitution of one court-appointed psychiatrist for another in murder prosecution; conflict in original psychiatrist's schedule and defendant's uncooperative behavior necessitated substitution, and there was no indication that second psychiatrist was unqualified. C.R.S. 16-8-106(1).

3. Criminal Law -- 641.3(11)

Ex parte order substituting one courtappointed psychiatrist for another in murder prosecution did not deny defendant his constitutional right to counsel during course of examination because defendant had no such right. U.S.C.A. Const.Amend. 6.

4. Criminal Law -- 438(6)

Probative value of photographs and videotapes of scene of murder victim's decapitation did not outweigh their probative value as to defendant's ability to deliberate.

5. Criminal Law -- 393(1)

Although murder defendant had statutory privilege against self-incrimination during course of court-ordered psychiatric examination, no *Miranda* warning was required because examination did not implicate defendant's rights under Fifth Amendment. U.S.C.A. Const.Amend. 5; C.R.S. 16-8-106(2).

6. Criminal Law -- 393(1)

Even if murder defendant had right to terminate court-ordered psychiatric examination, there was insufficient showing in record that he in fact exercised such prerogative such that his statutory privilege against self-incrimination was violated when psychiatrist continued questioning; although defendant expressed some initial reluctance to discuss certain topics during examination, defendant described events in detail when psychiatrist returned to topic later in examination. C.R.S. 16-8-106(2).

7. Criminal Law -- 393(1)

Because issue of murder defendant's sanity was separate proceeding before jury that could not consider issue of guilt, there was no implication of defendant's privilege against self-incrimination when court-appointed psychiatrist continued questioning after defendant expressed reluctance to discuss certain topics. U.S.C.A. Const. Amend. 5.

8. Criminal Law -- 486(6)

Testimony of psychiatrist who had examined murder defendant pursuant to court order was properly admitted

during guilt trial to rebut defendant's defense of impaired mental condition. C.R.S. 16-8107.

9. Criminal Law -- 393(1)

Court-appointed psychiatrist may lawfully pursue questions designed to elicit responses helpful in arriving at opinion regarding sanity, and such questioning may continue beyond defendant's expressed reluctance to discuss particular topic without violating his constitutional or statutory privilege against self-incrimination. U.S. C.A. Const.Amend. 5; C.R.S. 16-8-106(2).

10. Criminal Law -- 407(1)

Prosecution should not have been permitted to present evidence at sanity trial that murder defendant had asserted his constitutional rights after being given his *Miranda* warnings. U.S.C.A. Const. Amend. 14.

11. Criminal Law -- 1166(12)

Erroneous admission of evidence at murder defendant's sanity trial that he had asserted his constitutional rights after being given *Miranda* warnings constituted reversible error inasmuch as there was considerable testimony offered to show that defendant was insane and evidence was admitted solely for purpose of attempting to show defendant's rationality shortly after his apprehension. U.S.C.A. Const. Amend. 14.

12. Criminal Law -- 452(2)

Murder defendant's mother should have been permitted to render opinion regarding his "state of mind" or "mental status" during time that he lived with her, which ended three months before murder was committed, notwithstanding that mother was not qualified as expert. C.R.S. 168-109.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Robert M. Petrusak, Asst. Atty. Gen., Denver, for plaintiff-appellee.

David F. Vela, State Public Defender, Michael J. Heher, Deputy State Public Defender, Denver, for defendant-appellant.

PIERCE, Judge. Defendant, Philip Leslie Galimanis, appeals the trial court judgment entered upon jury verdicts finding him guilty of first degree murder, motor vehicle theft, and violent crime. We affirm in part and reverse in part. The operative facts of this case are not in dispute. In April 1983, the victim was found dead on the floor of her apartment. She had been beaten, stabbed, and decapitated. Police discovered that the victim's car had been taken from the apartment complex and was still missing. Nearly twenty-nine hours later, police located the automobile and discovered defendant inside, asleep. When awakened, he was somewhat incoherent and disoriented. Defendant was then arrested and later charged.

In June 1983, defendant entered a plea of not guilty by reason of insanity. Pursuant to § 16-8-104, C.R.S. (1986 Repl. Vol. 8A), a sanity trial was held, and the jury found that defendant was sane. Subsequently, defendant was tried and convicted of the substantive crimes by a different jury.

I.

Defendant asserts that the trial court abused its discretion in allowing a substitution of psychiatrists by an *ex parte* order. We find no abuse.

Section 16-8-106(1), C.R.S. (1986 Repl. Vol. 8A) provides that:

> "For good cause shown, upon motion of the prosecution or defendant, or upon the court's own motion, the court may order such further or other examination . . . as is advisable under the circumstances."

The purpose behind this section is to cause the trial court, in the exercise of judicial discretion, to decide whether good cause has been shown or exists for the appointment of additional experts. *Massey v. District Court,* 180 Colo. 359, 506 P.2d 128 (1973).

[1] Therefore, in order to effectuate the purpose behind this section, we conclude that it is a better practice to afford both parties the opportunity to present evidence regarding the good cause necessary for a substitution of experts before the substitution is made.

The record here shows that a hearing on the substitution issue was held approximately nine days after the substitution was made. Nevertheless, at the hearing, defendant was afforded ample opportunity to present evidence concerning the substitution issue. Also, nothing in the record indicates that he was prejudiced in any way by the *ex parte* substitution. Accordingly, the order did not affect his substantial rights. *See* Crim.P. 52(a).

[2] We also reject defendant's assertion that the trial court abused its discretion in finding that good cause existed for the substitution of psychiatrists. The record shows that a conflict arose in the original psychiatrist's schedule, and, because of that conflict and the uncoopera-

tive behavior of the defendant, it became necessary to substitute psychiatrists. The record contains no evidence that the subsequent mental examiner was unqualified. Under these circumstances, we conclude that the trial court's finding of good cause was not an abuse of discretion. *See Garza v. People,* 200 Colo. 62, 612 P.2d 85 (1980).

[3] Finally, we reject defendant's contention that the *ex parte* order denied him his constitutional right to counsel during the course of the examination. Defendant has no such right. *See United States v. Cohen,* 530 F.2d 43 (5th Cir.1976), *cert. denied,* 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed. 2d 130 (1976).

II.

[4] We also find unpersuasive defendant's contention that certain photographs and video tapes admitted into evidence were unduly prejudicial. Although we agree that the evidence reflects a shocking decapitation scene, the evidence was relevant and probative of the defendant's ability to deliberate. Our review of the record leads us to conclude that the evidence was not so unduly prejudicial as to outweigh its probative value. *See People v. Avery,* 736 P.2d 1233 (Colo.App.1986); *see also* CRE 403.

III.

[5-9] Defendant also argues that the trial court erred in failing to exclude the entire testimony of the prosecution's psychiatrist at both the sanity trial and the trial on the merits. Defendant maintains that the psychiatrist improperly continued questioning him after he had expressed some reluctance to discuss particular topics,

thereby asserting his *Miranda* rights. We disagree.

A court-ordered psychiatric examination does not implicate defendant's rights under the Fifth Amendment. *United States v. Byers,* 740 F.2d 1104 (D.C.Cir.1984). Although defendant has the privilege against self-incrimination during the course of the examination pursuant to §16-8-106(2), C.R.S. (1986 Repl. Vol. 8A), no *Miranda* type warning is required. A lengthy personal interview is one of the few effective means of ascertaining sanity. See *United States v. Albright,* 388 F.2d 719 (4th Cir. 1968). Indeed, it would be nearly impossible to evaluate a person's sanity without making inquiry. *See Thornton v. Corcoran,* 407 F.2d 695 (D.C.Cir.1969).

Even if we assume that defendant had the right to terminate the psychiatric examination, there is insufficient showing in the record that he exercised such a prerogative. He expressed some initial reluctance to discuss certain topics during the course of the examination. However, when the psychiatrist returned to the topic later in the examination, defendant described the events in detail. There is nothing in the record to show that his comments were coerced or involuntary in any way, or that his responses were the result of surreptitious mental invasion. *See Early v. Tinsley,* 286 F.2d 1 (lOth Cir.1960), *cert. denied,* 365 U.S. 830, 81 S.Ct. 717, 5 L.Ed.2d 708 (1961).

Moreover, because the sanity issue is a separate proceeding before a jury that cannot consider the issue of guilt, there is no implication of a defendant's privilege against self-incrimination. *Lewis v. Thulemeyer,* 189 Colo. 139, 538 P.2d 441(1975). Self-incrimination, by definition, applies to the admission of evidence to aid in establishing the guilt of the accused, not his sanity. *Lewis v. Thulemeyer,*

supra. Moreover, there is no evidence here that defendant was assured that these statements would not be used against him. *See Wainwright v. Greenfield,* 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1985). Consequently, there is no merit to defendant's argument that the psychiatrist's testimony was improperly admitted at the sanity trial in violation of his privilege against self-incrimination.

We also reject defendant's contention that the psychiatrist's testimony was improperly admitted during the guilt trial to rebut defendant's defense of impaired mental condition. Admission of such evidence is expressly allowed for that purpose by statute, the validity of which is not contested here. §16-8-107, C.R.S. (1986 Repl. Vol. 8A).

Accordingly, we conclude that a psychiatrist may lawfully pursue questions designed to elicit responses helpful in arriving at an opinion regarding sanity. This questioning may continue beyond a defendant's expressed reluctance to discuss a particular topic without violating his constitutional or statutory privilege against self-incrimination. Therefore, we find no error in the trial court's admission of the psychiatrist's testimony during the guilt trial to rebut defendant's claim of impaired mental condition.

IV.

[10-11] Defendant also contends that the trial court erred in allowing the prosecution to present evidence at his sanity trial that he had asserted his constitutional rights after being given a *Miranda* advisement. We agree.

In *Wainwright v. Greenfield, supra,* the Supreme Court determined that admission of a defendant's post-advisement

statement asserting his *Miranda* rights violated his due process rights guaranteed by the Fourteenth Amendment. It held:

> "What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the state's assurance that the invocation of those rights will not be penalized."

In the present case, after being given a *Miranda* advisement, defendant asserted his right to an attorney before questioning by police. This assertion was used by the People as probative of defendant's sanity at his sanity trial. Use of defendant's statements for these purposes was expressly rejected by the Supreme Court in *Wainwright v. Greenfield*, and therefore, that case mandates reversal of defendant's sanity adjudication.

We reject the prosecution's contention that, because the issue of sanity was conducted in a separate, bifurcated proceeding, the admission of this evidence was probative of defendant's sanity and was, therefore, not objectionable. Even though there was no separate sanity trial in *Wainwright v. Greenfield, supra*, its holding is premised upon the unfairness of admitting a defendant's statements after law enforcement officers have implicitly assured him that such evidence will not be used. The Court held that the unfairness is grounded in the due process clause of the Fourteenth Amendment, a right to which a criminal defendant is entitled even at a sanity trial. Therefore, defendant's statements invoking his right to counsel after his *Miranda* advisement may not be used.

We further reject the People's argument that admission

of defendant's statements was harmless beyond a reasonable doubt. The record shows that a motion *in limine* was filed by the prosecution for the sole purpose of admitting this evidence. There was considerable testimony offered to show that defendant was insane, and the statements in question were admitted solely for the purpose of attempting to show defendant's rationality shortly after his apprehension. Also, considering the prosecution's reliance upon the evidence throughout the proceedings, we conclude that the error was not harmless beyond a reasonable doubt. *See United States v. Remigio,* 767 F.2d 730 (10th Cir.1985), *cert. denied*, 474 U.S. 1009,106 S.Ct. 535, 88 L.Ed.2d 465 (1985).

V.

[12] While we do not rule on whether the error is reversible, because this matter will be retried and the issue will probably arise again, we also agree with defendant's contention that his mother was improperly excluded from rendering an opinion regarding his "state of mind" or "mental status" during the time that he lived with her which ended three months before this crime was committed.

Section 16-8-109, C.R.S. (1986 Repl. Vol. 8A) provides that:

> "In any trial or hearing in which the mental condition of the defendant is an issue, witnesses not specially trained in psychiatry or psychology may testify as to their observation of the defendant's actions and conduct, and as to conversations which they have had with him bearing on his mental condition, and they shall be permitted to give their opinions or conclusions concerning the mental condition of the defendant."

Defendant's mother testified at great length about the defendant's erratic behavior and the contacts that he had with various psychiatrists and mental institutions throughout his lifetime. In particular, she testified concerning his actions and life-style during the months which preceded his leaving her home in Chicago and moving to Denver, some three months before the incidents of April 1983. She was not asked to give her opinion as to his sanity or his state of mind at the time the crime was committed.

Nevertheless, the trial court would not allow her to render any opinion on the defendant's mental condition because she was not qualified as an expert, and because she had only one minimal contact with defendant in the three months immediately preceding the crime.

The first reason given for excluding the opinion is overcome by the language of § 16-8-109, C.R.S. (1986 Repl. Vol. 8A). The latter reason is not applicable because her minimal contact with defendant after he left home had no bearing on what she observed while he was still at home. The question asked of her pertained only to the four-month period during which he was at home. Accordingly, under the provisions of the statute, and the state of this record, she should have been allowed to render an opinion or conclusion concerning his mental condition during the time from September 1982 to January 3,1983, subject to a determination of relevancy.

VI.

Defendant also maintains that voir dire instructions regarding the fact that the prosecution would not be seeking the death penalty were improperly given. While

under the circumstances of this case these instructions did not amount to reversible error, on remand the trial court should refrain from such comment. *See People v. Hickam*, 684 P.2d 228 (Colo. 1984).

VII.

We have reviewed and considered the remainder of defendant's contentions regarding various evidentiary rulings by the trial court, and we find the rulings either not in error or not likely to occur on retrial.

Accordingly, the adjudication of sanity is reversed, and the cause is remanded with directions that the defendant be afforded a new sanity trial. In the event defendant is found to have been sane at the time of the offense, then the judgments of conviction stand affirmed. If defendant is found to have been insane at the time of the offense, then the judgments of conviction will be vacated.

CRISWELL, J., concurs.

METZGER, J., concurs in part, and dissents in part.

METZGER, Judge, concurring in part and dissenting in part.

I respectfully dissent from Part IV of the majority opinion which holds that the admission of defendant's post-advisement assertions of his *Miranda* rights at the sanity trial was reversible error. I believe that any error relating to the use of these assertions was harmless beyond a reasonable doubt and, thus, does not constitute a basis to reverse the defendant's conviction.

If there is overwhelming support in the record for a jury's verdict, error in the admission of other cumulative evidence is harmless beyond a reasonable doubt. *People v. Steele,* 193 Colo. 87, 563 P.2d 6 (1977). Further, errors of constitutional magnitude may properly be considered harmless if the evidence derived from the violation is cumulative of other evidence from which similar inferences may be drawn. *See People v. Madonna,* 651 P.2d 378 (Colo.1982); *People v. Roark,* 643 P.2d 756 (Colo.1982).

In this case, defendant did not deny having killed and decapitated the victim, and accordingly, the central issue for the jury's determination was defendant's state of mind at the time he did so. Defendant's sole assertion was that he killed the victim during a psychotic episode. He contended that he had suffered from these episodes intermittently for several years. Psychiatric testimony established that these episodes were transient and temporary.

The trial court determined that the defendant's behavior at the time of his arrest, twenty-nine hours after the victim's death, was relevant to a determination of his mental state at the time of the victim's death. While I do not necessarily agree with that ruling, since defendant's psychotic episodes were described as temporary and relatively brief, the evidence concerning defendant's sanity and rationality at his arrest is overwhelming.

Seven police officers testified that defendant behaved normally after his apprehension, and they described in detail his dress, his recognition of media personnel and his attempts to avoid them, his recognition of police officers he knew, his understanding of police instructions, and his concern about what would happen to the victim's car. These were not the words or actions of a man in the throes

of a psychotic episode.

Moreover, the evidence describing defendant's actions during and after the victim's death belies the notion that defendant was experiencing a psychotic episode. The medical experts testified that defendant had engaged in a lengthy struggle with the victim and that he had severely beaten her about the face and head. He then inflicted several stab wounds, to the jaw, chest, and back, including several "hesitation-type" punctures to her back. Finally, while the victim was still alive, defendant began a meticulous and painstaking decapitation, which took "a significant amount of time" --less than "hours" but more than a few minutes. Thereafter, he washed his hands, changed his shirt, rummaged through the trunk of his inoperable car, and fled in the victim's car. He conceded that he had the requisite state of mind--specific intent--to be guilty of aggravated motor vehicle theft by taking the victim's car.

Therefore, the passing references to defendant's invocation of his right to counsel were cumulative of other, more probative evidence establishing his sanity, and did not constitute a sufficiently significant portion of the evidence in the sanity trial to constitute reversible error.

Moreover, I find the majority's reliance on *Wainwright v. Greenfield,* 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986) to be overly mechanistic. In *Wainwright*, the evidence concerning the defendant's sanity and that concerning his guilt were inextricably interwoven in a single sanity/guilt trial. Thus, admission of his post-advisement statement may well have been prejudicial. Colorado's bifurcated sanity/guilt proceedings minimize the problem of this prejudice. More importantly, in *Wainwright v. Greenfield, supra*, the prosecution's failure to argue that admission of the

defendant's statements was harmless error constituted an essential basis for both the majority's holding and the special concurrence. Here, however, the People did so argue, and I agree that the error was harmless.

Consequently, I would not reverse defendant's sanity adjudication and conviction. As to Part V, I consider the error to be harmless and, thus, not a basis for reversal. I agree with the majority's disposition of the remaining issues in this case.

APPENDIX B

SUPREME COURT, STATE OF COLORADO
Case No. 885C624
Certiorari to the Colorado Court of Appeals 84CA0809
Jefferson County District Court 83CR364

AMENDED ORDER OF COURT (See Cross-Petition Issues 4 and 5)

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner/Cross-Respondent,

v.

PHILIP LESLIE GALIMANIS,

Respondent/Cross-Petitioner.

Upon consideration of the Petition and Cross-Petition for Writ of Certiorari filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition and Cross-Petition shall be, and the same hereby are, GRANTED as to the issues set forth below, and the briefs shall be filed as follows:

(a) Petitioner/Cross-Respondent's Opening Brief shall be filed within forty days from this date;
(b) Respondent/Cross-Petitioner's Combined Answer

and Opening Brief shall be filed within forty days from receipt of the Opening Brief;

(c) Petitioner/Cross-Respondent's Combined Answer and Reply Brief may be filed within thirty days from receipt of the Combined Answer and Opening Brief; and

(d) Respondent/Cross-Petitioner's Reply Brief may be filed within fourteen days from receipt of the Combined Answer and Reply Brief.

BY THE COURT, EN BANC, JULY 17, 1989.

The issues as announced by the Court this day are as follows:

Summary of issues presented in petition for certiorari:

Whether a majority of the court of appeals erred in holding that the admission at the defendant's sanity trial of his post-advisement assertions of his *Miranda* rights was reversible error.

Whether the use in the defendant's sanity trial of his post-advisement assertions of his *Miranda* rights was harmless error.

Whether the lay opinion of the defendant's mother regarding his sanity was properly excluded by the trial court.

Summary of issues presented in cross-petition for certiorari:

Whether the trial court's *ex parte* order for substitution of Dr. Wahl, a court-appointed psychiatrist, violated

defendant's rights to counsel and due process where defense counsel was not afforded an opportunity to object to the substitution, to prepare his client for the examination, or to be present during the examination.

Whether the admission at the defendant's sanity trial of Dr. Wahl's testimony violated the defendant's right to counsel, his privilege against self-incrimination, and his due process rights where Dr. Wahl had questioned the defendant without obtaining a waiver of his *Miranda* rights and continued questioning him even after the defendant expressed his unwillingness to discuss certain topics.

Whether the trial court erred in admitting evidence at the trial on the merits of the defendant's statements made to police officers after he had asserted his right to remain silent and right to counsel.

Whether the admission into evidence of the testimony of Dr. Heron, the court-appointed psychiatrist who performed the competency examination, violated the controlling statute and the defendant's rights to remain silent and to due process of law where that testimony included and was based on the defendant's numerous assertions of his right to remain silent, Dr. Heron ignored these assertions, the defendant was not advised of and did not waive his rights and of the consequences of making statements to Dr. Heron, and further, whether the statutory scheme of §§ 16-8-106(2) and -107, 8A C.R.S. (1986 & 1988 Supp.), violates the due process clauses and the fifth amendment and Colo. Const. art. II, § 18.

Whether the admission at the defendant's guilt trial of Dr. Wahl's testimony violated the defendant's right to counsel, his privilege against self-incrimination, and his due

process rights where Dr. Wahl had questioned the defendant without obtaining a waiver of his *Miranda* rights, and whether §§ 16-8-106(2) and -107, 8A C.R.S. (1986 & 1988 Supp.), are unconstitutional.

DENIED AS TO ALL OTHER ISSUES.

APPENDIX C

SUPREME COURT, STATE OF COLORADO
Case No. 88SC624
Certiorari to the Colorado Court of Appeals 84CA0809
Jefferson County District Court 83CR364

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner/Cross-Respondent,

v.

PHILIP LESLIE GALIMANIS,

Respondent/Cross-Petitioner.

Upon consideration of the Record on Appeal, together with the written and oral arguments of counsel, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition and Cross-Petition for Writs of Certiorari shall be, and the same hereby are, DENIED as having been improvidently granted.

BY THE COURT, EN BANC, FEBRUARY 19, 1991.

APPENDIX D

SUPREME COURT, STATE OF COLORADO
CASE NO. 88SC624

CERTIORARI TO THE COLORADO COURT OF APPEALS, 84CA0809
JEFFERSON COUNTY DISTRICT COURT, #83CR364

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner/Cross-Respondent,

vs.

PHILIP LESLIE GALIMAINIS,

Respondent/Cross-Petitioner.

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MARCH 11, 1991.
Chief Justice Rovira would grant.
Justice Lohr does not participate.

APPENDIX E

Pertinent Testimony of Officer Keiser.

Q Describe the behavior that you observed the defendant engage in during the time he was in your car. Tell us what he was doing.

When first got him into the car, was there any other persons there?

A At the time I got him in my car, I went around and got in my car, also. Another officer, Officer Rael from our department got in the back seat. At that time, I advised Mr. Galimanis of his constitutional rights. I advised him of his rights, asked if he understood. I asked him a second time if he understood his rights. He said -- he nodded the first time, said yes the second time that he understood his rights.

Q Okay. Did you tell him two separate times what his rights were, or did you tell him what his rights were, after each question he nodded, then you asked him for an affirmative answer or an answer verbally?

A When I read him his rights, each sentence of the rights I read or I told him, I asked him, do you understand.

Q Uh-huh.

A And he nodded and said yes.

Q Okay. Would you tell us essentially what the rights were that you advised the defendant of, at that time.

A I advised him that he had the right to remain silent. Anything he said can be and will be used against him in a court of law. He had the right to talk to a lawyer before questioning, have him present during questioning, and if he could not afford a lawyer, one will be appointed for him before questioning. He relayed to me that he did understand each right.

Q Okay. And which officer was present with you when you instructed the defendant regarding his rights?

A That was Officer Rael.

Q Now, after you asked if he understood and he answered you verbally, did you ask him any questions?

A The only question I asked Mr. Galimanis was what his name was and we had information at roll call that this party that was wanted was possibly armed with a gun or a weapon, specifically a gun. I asked him, at that time, if he had a gun or was his gun in the car. At that time, he said he had no gun; he wanted to talk to a lawyer.

I also asked him in the car -- the only other question was, I asked him his name, date of birth and the description of who he was for our contact information, like height, weight, eye, hair color.

Q While you were there, were there any members of the media around while you were still at the scene with the defendant in your car?

A Approximately five minutes after I got him in the patrol car, a Channel 4 News van showed up in front of the patrol car about, oh, 50, 75 feet, and started to set up his cameras.

Q Did you observe any reaction from the defendant in response to this news truck?

A As soon as this news truck came around the curve, Mr. Galimanis said, "Oh, shit."

Q And did he engage in any physical behavior, did he do anything physically that you observed, at that time?

A After that, a couple of other news vehicles came. I believe Channel 7 and Channel 9 were there. They got out their cameras. Mr. Galimanis told me, "Don't let them take pictures of me," and also ducked his head between his knees for as long as we were there and as long as the cameras were pointing at him.

Q Okay. And again, while you are still in the patrol car, did you observe or hear any particular statements or noises from the defendant?

A He would say something under his breath. I remember him saying, at one time, before we took him down, I think it was before the news truck came and after I told him he was under arrest for homicide, that nobody had anything on him and kind of chuckled. While he was in my patrol car, he mumbled some sentences under his breath and would kind of chuckle about what he said. I could not hear him and I did not pursue in seeing what he said, since I was instructed not to ask him any questions.

Q Okay. The mumbling that you talked about, did that appear to you to be in response to external happenings or things going on around the patrol car?

A Yes. He would see things or hear things and he would mumble something under his breath. It was sentences that he was not intending me to hear but was saying it out loud himself.

Q Okay. And as far as the sounds that you heard, were they totally incomprehensible sounds. Were they language that you recognized?

A They were in English. I could not hear them. He said them so softly. The only thing I did hear was they have nothing on me.

Q How long was the defendant in your patrol car?

A He was in my patrol car from the time we put him in to when we got him down to headquarters, approximately an hour, an hour and fifteen minutes, if not more.

Q Okay. And what took place at headquarters down in Denver?

A We took him downtown to headquarters. We proceeded up to the Homicide Detail where we put him in

a room and then after a few minutes, after everything was put together, statements, we then processed him through our jail, took him upstairs. We did not fingerprint him. We photographed him, but we did not fingerprint him. We wrapped his hands with lunch sacks to preserve any evidence that was on his hands, and at that time he was wondering why this was happening.

Q Okay. Did he ask you a specific question about that?

A He said why are you doing this.

Q And did you respond to him?

A We told him that we had to wrap his hands to preserve any evidence that he might have on his hands.

Q So all told, Officer Keiser, how long were you with the defendant on that morning of April 21?

A Approximately two-and-a-half to three hours.

Q And during that time, did the defendant walk appropriately? Was he able to control his movements and walk?

MR. GARLIN: Objection. It's an improper form. She can ask him what he observed.

THE COURT: It is a leading question. I will sustain the objection.

Q (By Ms. Malatesta) All right. Sir, did you notice anything about the way the defendant walked?

A He walked normally and did not require any assistance.

Q Did you notice anything about the way the defendant was dressed?

A He was dressed with blue jeans and, I believe, a jean-type jacket.

Q Okay. What was the weather like in terms of his dress?

A It wasn't cold, but it was raining. If you were outside, you'd have to have a raincoat, but other than that,

it wasn't very cold.

Q How would you characterize the way that he spoke with you in responding to your questions?

A Like I said before, I didn't ask him too many questions. The only questions I did ask him was his name, if he understood his rights, his description. I asked him where he lived and he responded without any hesitation and told me.

Q Okay. Could you understand his responses?

A Yes, ma'am, I could.

Q And on the times that you asked him things, did he appear to acknowledge your question, would he answer it or not?

A Yes, ma'am, he did.

Q Okay. Did he seem to you to know where he was?

A He never told me specifically that he was in a patrol car or with the police, but he knew that we were -- he asked me where we were going to take him and I told him to our police headquarters.

Q Okay. And did he follow instructions when requested by you?

A Completely.

Q Okay. Did he request anything of you regarding the vehicle that he was found in?

A Before we left, we had the vehicle -- after we pulled Mr. Galimanis out of the vehicle, we locked and shut all the doors before we left. He made a statement of "What are you going to do with the car?"

APPENDIX F

Pertinent Testimony of Detective Light.

Q Okay. Tell us how you went through the advisement form.

A Well, I stated to him, you are advised that you are now being interviewed regarding a first degree murder. Before we ask you any questions, you must understand your rights. Number one, you have the right to remain silent. At that time, I would ask him, do you understand this?

Q What did he say?

A He replied yes.

Q He did reply at those points?

A Yes.

Q All right. Were his eyes open?

A No.

Q Would his demeanor change?

A No.

Q Would his posture change?

A No.

Q Okay. Go ahead.

A And number two, anything you say can and will be used against you in court, in the event a case is filed. Do you understand this?

Q And?

A His reply was yes.

Q Did anything change about him?

A No.

Q Okay.

A You have the right to talk to a lawyer for advice before we ask you any questions and to have him present with you during questioning. Do you understand this? Yes.

Number four. If you cannot afford a lawyer,

one will be appointed for you before any questioning, if you wish. Do you understand this? His reply was yes.

Q All right.

A Number five. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer. Do you understand this? His answer, again, was yes.

Q All right. Again, throughout the five questions you asked him, the five times you paused for an answer, did the defendant ever change his posture, open his eyes?

A No. He remained seated with his chair tipped back, head against the wall, eyes closed.

Q He would answer you from that posture?

A Yes.

Q Was there any hesitation in his answers?

A No.

Q Okay. After you got finished with that, what did you do?

A I then asked him, at that time, if he wanted to talk to us about this or if he wanted to have a lawyer present.

Q And what did he say?

A He stated no, I don't want to talk to you. I want a lawyer.

Q Okay. Again, the same response from the same posture?

A Yes.

Q All right. How long did this process take up to this point?

A My total contact with him, or just --

Q From the time you first started with him in the little room to the time you just end with him right now.

A Maybe ten minutes.

Q Okay. When he said that, what did you do?

A That he wanted a lawyer?

Q Uh-huh.

A I told him that we wouldn't question him anymore. That was the end of it.

Q Did he say anything further?

A No.

APPENDIX G

Pertinent Testimony of Dr. Wahl.

Q ....Did you have the opportunity to review reports compiled by both police officers from the Denver Police Department, as well as police officers from the Wheat Ridge Police Department pertaining to the defendant's arrest on April 21?

A Yes

Q And were you aware of the defendant's request for a lawyer upon his arrest, as well as his general appearance and demeanor, at that time?

A It's my understanding that the only thing that he said to the police when he was arrested, that he has no comment, that he wants an attorney.

Q Okay.

A I am aware that he was in clothing which was bloodstained. I was aware that he was sleeping in the car in a residential block in the Denver area.

Q And again, do those facts have any particular significance to you in your determination of legal insanity regarding this man?

A It suggests, again, that when he was arrested, he had an idea of what he was being arrested for. He had very clear control over what he said, because he said nothing. He was aware of legal proceedings and had the wherewithal to request an attorney before he said anything.

APPENDIX H

Pertinent Argument of Prosecutor

He also says what are you going to do with the car, a passing thought, a logical thought, a rational thought. And most telling, ladies and gentlemen, is when asked after being advised of his rights and acknowledging them, understanding them, he says quite clearly I want a lawyer. He knows that he is in trouble. He knows he has an awareness, that he was acting wrongfully. Now, looking at that, and then, again, he says the same thing when he is talking to the Wheat Ridge Police Department upon another advisement of rights, you can tell the way the man's mind is operating.

CERTIFICATE OF MAILING

I, Gale A. Norton, a member of the bar of this court, herewith certify that the within PETITION FOR WRIT OF CERTIORARI has been deposited in the United States Mail, first-class postage prepaid, addressed to Mr. Joseph Spaniol, Jr., Clerk of the Court, Supreme Court of the United States, Washington, D.C. 20593 and that to my knowledge the mailing took place on April 30, 1991, within the permitted time for filing the brief.

GALE A. NORTON
Attorney General

Subscribed and sworn to before me in the County of _____, State of Colorado, this _____ day of _____, 1991.

_____
NOTARY PUBLIC

My Commission expires:

_____

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PETITION FOR WRIT OF CERTIORARI upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 30th day of April, 1991, addressed as follows:

Michael Heher
Deputy State Public Defender
110 Sixteenth Street, Suite 800
Denver, Colorado 80202

FILED
MAY 30 1991
OFFICE OF THE CLERK

No. 90-1678

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF COLORADO,
Petitioner

v.

PHILIP LESLIE GALIMANIS
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the Colorado Court of Appeals

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE PERTINENT FACTS AND PROCEEDINGS . . .1

REASONS WHY THE PETITION SHOULD BE DENIED 9

INTRODUCTION AND SUMMARY OF THE ARGUMENTS . . .9

A. THIS COURT'S DECISION IN *WAINWRIGHT V GREENFIELD* IS DISPOSITIVE OF THE STATE'S ALLEGEDLY "UNRESOLVED" ISSUE, AND THERE IS NO CONFLICT OR DIFFERENCES AMONG COURTS . .10

B. THE ISSUE PRESENTED TO THIS COURT WAS NOT PRESENTED TO THE STATE COURTS BELOW 12

C. THE EXISTENCE OF NUMEROUS OTHER, UNRESOLVED ISSUES PERTAINING TO THE PERTINENT EVIDENCE AND ARGUMENTS, AS WELL AS ANOTHER UNCHALLENGED ERROR DURING THE SANITY TRIAL, WOULD RESULT IN A PURELY ADVISORY OPINION FROM THIS COURT 13

D. THE COLORADO COURT OF APPEALS' HOLDING THAT THE ERROR WAS NOT HARMLESS IS UNWORTHY OF REVIEW SINCE IT PRESENTS A PURELY FACTUAL AND CASE-SPECIFIC ISSUE, AND THAT COURT PLAINLY APPLIED THE CORRECT LEGAL STANDARD AND CONSIDERED THE RELEVANT FACTS AND CIRCUMSTANCES IN ARRIVING AT ITS CONCLUSION 14

E. THE COLORADO COURT OF APPEALS' DECISION TO REVERSE IS BASED ON ONLY ONE OF THE TWO VIOLATIONS OF *WAINWRIGHT V. GREENFIELD*, AND THUS ANY DECISION BY THIS COURT ON THE MERITS OF THAT DECISION WOULD BE SPECULATIVE AND COULD NOT RESULT IN A JUDGMENT FOR THE STATE 16

F. AS DEMONSTRATED BY THE DEARTH OF LITIGATION AND CONTROVERSY ABOUT THE RULE OF *DOYLE* AND *GREENFIELD*, THE STATE'S PURPORTED DISTINCTIONS OF THIS COURT'S PRIOR DECISIONS WOULD SERVE ONLY TO CLOUD BRIGHT LINE RULES WHICH WORK WELL 17

RESPONSE TO THE STATE'S ARGUMENT I 18

RESPONSE TO THE STATE'S ARGUMENT II 25

CONCLUSION 30

TABLE OF AUTHORITIES

Comm. v. Hunsberger, 523 Pa. 92, 565 A.2d 152 (1989), *cert. denied*, 107 S.Ct. 1030 (1990) 11, 18

Doyle v. Ohio, 426 U.S. 610 (1976) . . . . . .9, passim

Edwards v. Arizona, 451 U.S. 477 (1981) 13, 19

Greenfield v. Wainwright, 741 F.2d 329 (11th Cir. 1984). 11

Griffin v. California, 380 U.S. 609 (1965). 13

Jacks v. Duckworth, 857 F.2d 394 (7th Cir. 1988) 11

Miranda v. Arizona, 384 U.S. 436 (1966) . . . . . 10, passim

New York v. Quarles, 467 U.S. 649 (1984) 19

Parks v. District Court, 180 Colo. 202, 503 P.2d 1029 (1972). 15

People v. Galimanis, 765 P.2d 644 (Colo. App. 1989). . . .13, 14-15, 17, 29

People ex rel Juhan v. District Court, 165 Colo. 253, 439 P.2d 741 (1968). . .15

Spevak v. Klein, 385 U.S. 511 (1967). 13

State v Greenfield, 337 So.2d 1021 (Fla.App. 1976). 11

State v. Hull, 210 Conn. 481, 556 A.2d 154 (1989). 11

State v. Mauro, 149 Ariz. 24, 716 P.2d 393 (1986) *rev'd on other grounds*, *Arizona v. Mauro*, 481 U.S. 520 (1987). 11

Sulie v. Duckworth, 864 F.2d 1348, 1354 (7th Cir. 1988) 11

United States v. Hale, 422 U.S. 171 (1975). 28

United States v. Remigio, 767 F.2d 730 (10th Cir. 1985), *cert. denied*, 474 U.S. 1009, 106 S.Ct. 535, 88 L.Ed.2d 465 (1985) 28

Wainwright v. Greenfield, 474 U.S. 284 (1986) . . . . 9, passim

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendments V, VI, XIV . . . . passim

COLORADO STATUTES

Colorado Revised Statutes, § 18-8-605 3

COLORADO COURT RULES

Colorado Appellate Rules, 40, 52 12

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Mr. Philip Galimanis was the accused citizen below and will be referred to by name or as the accused. The State of Colorado was the prosecution below and will be referred to as the state or the prosecution. References to volumes and page numbers in the following form: (vol. 1, p. 1), refer to the volume and page numbers of the record on appeal in the Colorado Court of Appeals.

STATEMENT OF THE PERTINENT FACTS AND PROCEEDINGS

Mr. Galimanis was involuntarily committed to a mental hospital in Denver in early 1981, at the age of 18, two years before he killed his girlfriend of a couple of weeks.[1] The commitment was due to his extremely psychotic and often violent behavior, particularly towards his mother. Mr. Galimanis' mental problems arose, according to the numerous

---

1. Mr. Galimanis killed Ms. McQueen two years to the day after his father died while Mr. Galimains was in the hospital.

psychiatrists who examined and/or treated Mr. Galimanis before and after his arrest, due to a psychotic attachment to his mother and his inability to separate himself from her. After a normal-seeming childhood he began to show definite signs of severe mental illness at about the age of fifteen. He had no criminal history before that point. His behavior became, by any standards, extremely bizarre, including compulsive walking around the house, irrational speech and continuous "insane" laughter, talking to himself, and extreme violence towards objects and his mother. Finally a psychiatrist to whom he was taken recommended that he be committed. Two experienced psychiatrists and a psychologist who examined and/or treated him before and during his commitment testified as to his severe mental illnesses. The treating psychiatrist diagnosed him as extremely psychotic at the time of his admission. His behaviors were bizarre and obviously inappropriate.

Mr. Galimanis was released from the mental hospital after a lengthy stay of ten months and after heavy drug treatment. He quickly disintegrated after he stopped taking his drugs, until he was acting even more bizarrely than before. For just a few examples, he would stay awake for days on end, talking and walking around his mother's house, and later his brother's apartment. His speech and thoughts were disjointed. He constantly thought people were following him. He had other irrational and bizarre delusions. His mother was finally forced to have him forcibly removed from her home by the police after he became violent and irrational. On one occasion he punched his mother and demanded that whoever was occupying his mother's body must leave it. Numerous lay witnesses testified at the sanity trial concerning his extraordinarily strange behaviors during this time. For example, he would enter restaurants, always ordering more than one meal for himself, talking on the phone to no one, rushing in and out of and around the restaurant, peering around walls, and carrying on very loud conversations with himself. He would stay awake for days on end, carrying a large can of coffee, talking to the television, screaming out the window at no one, and screaming at himself in the bathroom mirror, talking to dogs, and speaking generally in a bizarre fashion. He would sit in his dismantled car, honking the horn for hours. Shortly

before he decapitated his girlfriend of a few weeks with a pocket knife, apparently due to her decision to end their relationship, he walked back and forth on a basketball court for hours, slowly disrobing.

Before the sanity trial the prosecution filed a motion requesting that it be allowed to present evidence of Mr. Galimanis' assertion of his right to remain silent and right to counsel at the time of his arrest. The written motion alleged that, "[s]uch evidence is clearly probative of the defendant's state of mind at a time in close proximity to the date of the occurrence." At the hearing on the motion, the prosecution argued that it was permitted to present evidence of the accused's "assertion of his Fifth Amendment right."[2] The state argued that the evidence of Mr. Galimanis' assertion of those rights was "very probative of the issues in this case." Over objection, the trial court granted the motion. (vol. 7, p. 13)

Also before the sanity trial, the prosecution successfully moved for the trial court to rule that the state's evidence **not** be considered to be rebuttal of whatever evidence the accused presented. (vol. 1, p. 89; vol. 7, p. 2-5) In Colorado, as in Florida in *Wainwright v. Greenfield*, 474 U.S. 284 (1985), once some evidence which "raises" the issue of insanity has been presented, the burden of proving beyond a reasonable doubt that the accused was not insane at the time of the alleged offense falls on the prosecution. Colo. Rev. Stat. § 16-8-105 (2). Here, the state persuaded the trial court to rule that any evidence the state presents to show Mr. Galimanis' sanity not be considered rebuttal but, rather, be considered its case-in-chief. Thus, the state's various arguments concerning the "rebuttal" nature of the evidence of Mr. Galimanis' assertions of rights are not accurate, as a matter of fact and law in this case.

During opening statements the prosecution stated the following:

> So they take the defendant and they put him in Al Keiser's patrol car. While he is there, Al Keiser orally advises him of his *Miranda* rights, the rights you have probably all heard

---

2. A copy of the state's motion is attached as Appendix 1. A transcript of the state's arguments is attached as Appendix 2.

> on TV a number of times. He does this orally and the defendant responds he understands and he says I want my lawyer. (vol. 8, p. 22)
>
> You will hear from Detective Light, who, down at the Denver Police Department, advises the defendant of the nature of the charge, what he was being held for, first degree murder. A written advisement form was used which you will see which outlines the *Miranda* warnings that Al Keiser gave orally. Those were explained to the defendant. He said he understood. He sat back in his chair and said I want my lawyer here. (vol. 8, p. 24-25)

Defense counsel did not mention the post-arrest conduct or statements of Mr. Galimanis during opening statement. Nor did the defense call any witnesses to testify concerning those events or statements. The state's attempts in its petition to suggest that Mr. Galimanis called any witnesses on the matter of his arrest , or first raised the subject with any witness, are totally baseless.

Mr. Galimanis presented evidence from several lay and expert witnesses concerning the onset and progression of his mental illnesses. These included family members and the non-forensic psychologist and psychiatrists who evaluated and treated him until his release from the mental hospital. The diagnosis was of an extremely severe borderline personality disorder, which included psychotic episodes of the sort he was suffering from when he was committed. That psychosis took months to suppress.

The state then called a police officer out of order. That witness testified about Mr. Galimanis' supposedly normal behavior at the time he was booked into jail. Defense counsel impeached the witnesses with reference to his notation on a form that Mr. Galimanis needed counseling and has suicidal ideations.[3]

Mr. Galimanis presented testimony from numerous lay witnesses concerning his bizarre behavior and obvious mental problems from the time of his release from the mental

---

3. The state obviously attempts to suggest in its petition that it was actually Mr. Galimanis who first raised the issue of his conduct after his arrest with this police officer, as part of the state's scheme to represent its use of the evidence of Mr. Galimanis' assertions of rights as "rebuttal."

hospital until shortly before he killed his girlfriend.

Two experienced forensic psychiatrists and an experienced forensic psychologist testified as to Mr. Galimanis' severe mental illnesses, and one testified that in her opinion Mr. Galimanis was insane under Colorado law at the time of the killing. Their diagnoses differed only in the severity of the mental illnesses they perceived and their ability to totally rule out other illnesses. One psychiatrist, Dr. Kathy Morall, testified that Mr. Galimanis might actually be schizophrenic, but that he was at least suffering from an extremely severe borderline personality disorder with psychotic, schizophrenic features, and that he was in the throes of a psychotic episode at the time he killed his girlfriend. She testified that a psychotic episode connected with that disorder would be temporary rather than long standing, meaning it would last for hours or days rather than for weeks. Dr. Morall criticized the decision to release Mr. Galimanis from the mental hospital.

The state cross-examined Dr. Morall about the importance of Mr. Galimanis' ability to assert his right to remain silent at the time of his arrest. After establishing that Dr. Morall had read and considered the police reports, the prosecutor asked her:

> Q: Do you remember when the police came, they arrested him?
>
> A: Yes.
>
> Q: And they took him into custody?
>
> A: Yes.
>
> Q: And they read him his rights?
>
> A: Yes.
>
> Q: And he said, "I want my lawyer?"
>
> A: Yes. (vol. 10, p. 91-92)

Later, the following occurred:

> Q: We're not isolating it here. We are giving a whole bunch of facts which outline his activities, which shows not random but given his options some fairly rational things of what he was

doing?

A: I guess my interpretation of it would be giving

Q: And he even tells you where he's arrested, South Yates Way, and don't you think when someone is arrested and they are told, you are being charged with first degree murder and they read your rights to you, isn't it a natural response not to incriminate yourself? You don't want to tell them something that is going to make it easier?

A: There is an urgency to questions. I don't know that that would be a general statement I would agree.

Q: Don't you think someone who is charged with first degree murder is going to be aware there is a relative risk here to him?

A: It could be.

Q: That's one way of looking at it, right?

A: You could look at it.

Q: That's an inference you could draw from those facts, right?

A: Yes.

Q: That would be a reasonable inference?

A: I wouldn't draw them -- I wouldn't say someone else is being unreasonable. (vol. 10, p. 96-97)

A psychologist, Dr. Steven White, testified that his diagnostic impression was that Mr. Galimanis suffered from a borderline personality disorder with evidence of psychotic features, and a large number of features of more serious psychotic disorders. Dr. White could not rule out a final diagnosis of schizophrenia.

Another psychiatrist, Dr. Steven Miller, testified that the ultimate diagnosis of Mr. Galimanis -- borderline personality versus schizophrenia -- was irrelevant given the obviousness of his insanity.

The state cross-examined Dr. Miller about the importance of Mr. Galimanis' ability to exercise his rights:

Q: All right. Did you read the reports from Wheat Ridge and Denver concerning descriptions of his behavior while he was in the patrol car and also being advised of *his rights, asserting his rights*?

A: Yes.

Q: Isn't it true that in a forensic examination, that kind of evidence is important?

A: It was important.

Q: It was?

A: Yes.

Q: It shows some awareness of what is going on, the fact that he is charged with something very serious, *he elects to preserve his rights, to defend himself against those charges*; is that right?

A: It shows some awareness of that, probably. (vol. 11, p. 136-137, emphasis added).

Each psychiatrist testified that Mr. Galimanis was patently psychotic at the times of their evaluations of him.

The state called two lay witnesses to testify as to Mr. Galimanis' behavior before his arrest. Each initially asserted that he acted normally, but during cross-examination each admitted his strange and often bizarre behaviors. The prosecution called eight police officers to testify concerning Mr. Galimanis' behavior at the time of and after his arrest. The prosecution called Officer Keiser to testify as to his arrest of Mr. Galimanis and the assertion of rights by Mr. Galimanis. Keiser also testified as the statements he obtained from Mr. Galimanis after the assertion of rights. Keiser described Mr. Galimanis' 'normal' behavior. On cross-examination admitted that Mr. Galimanis carried on a chuckling, muttering conversation with himself in the police car.

There was no evidence or intimation that Mr. Galimanis possessed or owned a gun at any time. The supposed basis for Keiser's question about a gun was never shown.

Detective Light testified about Mr. Galimanis' assertion of his right to remain silent

at the Denver police station, and about his utterly disinterested demeanor at the time. Light described Mr. Galimanis' apparent ability to understand and respond to the *Miranda* advisements and questions.

Other police officers testified about their observations of Mr. Galimanis during the booking process. Mr. Galimanis recognized one officer as frequenting a bar near his apartment. Two officers stated that Mr. Galimanis showed no concern for what was going on while evidence was gathered and he was processed. At one point Mr. Galimanis said "Galimanis" four or five times for no reason.

The prosecution called two police officers to describe their contacts with Mr. Galimanis before this case. One arrested Mr. Galimanis for a DUI, at which time Mr. Galimanis spoke of his father -- who died two years to the day before Mr. Galimanis killed his girlfriend -- as is he were still alive. The other officer described the arrest of Mr. Galimanis for driving offenses and disturbance. He had been bit on the tongue by a woman he had tried to kiss, and he was proud of it. The officer felt that this was not strange behavior.

The state also called Dr. Wahl, a psychiatrist who had never before testified as to sanity. Dr. Wahl testified that he saw no evidence of psychosis or psychotic behavior by Mr. Galimanis at any time, including in his family history, or at the time of Ms. McQueen's death. He saw no evidence of any major mental illness in Mr. Galimanis. He opined that Mr. Galimanis was not legally insane, and that, even if he was psychotic before he killed his girlfriend, the experience of cutting of her head with a pocket knife would have shocked him back to reality.

The state also questioned Dr. Wahl about the significance of Mr. Galimanis' ability to assert his rights at the time of his arrest, as noted in Appendix G of the state's petition.

During closing arguments, the state argued that Mr. Galimanis' refusal to speak to the police was the "most telling" evidence of his sanity, as noted in Appendix H of the state's petition.

REASONS WHY THE WRIT SHOULD BE DENIED

INTRODUCTION AND SUMMARY OF THE ARGUMENTS

There exist several weighty reasons why the petition should be denied in addition to the lack of merit of the issues addressed by the state in its petition. Mr. Galimanis will first briefly summarize his arguments on the matters actually raised by the state, and then will address these additional reasons. He will then address the state's arguments in more detail.

The state presents two "questions" to this court. The first concerns only the state's evidence and arguments and comments at trial concerning Mr. Galimanis' assertion of *Miranda* rights to Officer Keiser, the first of the two policemen to whom he asserted his rights after receiving advisements. The state contends, to this Court for the first time, that it did not present evidence or arguments concerning Mr. Galimanis' post-advisement assertion of the right to remain silent at Mr. Galimanis' sanity trial in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976) and *Wainwright v. Greenfield*, 474 U.S. 284 (1986), but merely used evidence and argument of Mr. Galimanis' assertion of his right to counsel. The state perceives some major distinction between the two scenarios. However, the state's argument is not supported by the facts of this case or the few authorities it cites. This argument is not supported by the record in this case, since the state clearly presented evidence of the assertion of the right to remain silent, and expressly and frequently commented on the assertion of that right. Further, this Court in *Greenfield* rejected the very distinction the state now proposes. The state's argument is also refuted by the state's own actions and words at trial, where it did not recognize or draw the distinction it now contends has some constitutional significance. Below the state correctly contended that Galimanis asserted his

right to remain silent until he consulted an attorney to Officer Keiser.

The state's second question concerns its "harmless error" assertion. Admitting that its evidence of and comments upon Mr. Galimanis' second assertion of the right to remain silent were error, the state contends that those errors were harmless in this case. The state does not assert that the introduction of evidence of and arguments concerning the first assertion of rights were harmless, if erroneous. The state's "harmless error" contention is founded on a fundamentally incorrect view of the facts of this case. Further, it is primarily based on the patently incorrect premise that the bifurcated nature of the sanity trial makes a fundamental difference in the nature of the constitutional violation which occurs when the state uses an assertion of *Miranda* rights against the accused. In fact, in *Greenfield* this Court rejected the precise arguments made by the state here.

The state must prevail on both in order to merit relief, since the first issue applies only to the first assertion of rights.

A. THIS COURT'S DECISION IN *WAINWRIGHT V GREENFIELD* IS DISPOSITIVE OF THE STATE'S ALLEGEDLY "UNRESOLVED" ISSUE, AND THERE IS NO CONFLICT OR DIFFERENCES AMONG COURTS.

In *Wainwright v. Greenfield*, this Court resolved the precise issue which the state here presents as an "unresolved" issue. In *Greenfield* the state introduced evidence of the accused's assertions of his *Miranda* rights, by way of his refusals to answer questions until consulting with an attorney. This Court expressly included the assertion of the right to counsel under *Miranda* within the purview of its decision. Among the several instances of this inclusion is the following, most direct one:

> With respect to post-Miranda warnings "silence," we point out that silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as a desire to remain silent until an attorney has been consulted.

Greenfield, 474 U.S. at 632, n. 13.

In *Greenfield*, according to the Florida Court of Appeals, the accused told the police he wanted to talk to an attorney before he talked to them. *State v Greenfield*, 337 So.2d 1021, 1022 (Fla.App. 1976). The Eleventh Circuit's opinion reflects that the accused's "only" response was that he wanted to speak to an attorney. *Greenfield v. Wainwright*, 741 F.2d 329, 330 (11th Cir. 1984).

This aspect of this Court's holding has been recognized and applied consistently since. *See e.g., Jacks v. Duckworth*, 857 F.2d 394, 401 (7th Cir. 1988) ("*Wainwright v. Greenfield* now makes clear that a statement that a person does not want to speak until an attorney has been consulted also constitutes 'silence' under *Doyle*."); *Sulie v. Duckworth*, 864 F.2d 1348, 1354 (7th Cir. 1988) (same); *State v. Mauro*, 149 Ariz. 24, 716 P.2d 393 (1986) *rev'd on other grounds*, *Arizona v. Mauro*, 481 U.S. 520 (1987) (same); *State v. Hull*, 210 Conn. 481, 556 A.2d 154 (1989) (same). Thus, the question presented by the state has already been resolved by this Court.

Further, the Colorado Court of Appeal's decision does not conflict with the decision of any other court mentioned by the state. Contrary to the petition, the Pennsylvania Supreme Court did **not** hold in *Comm. v. Hunsberger*, 523 Pa. 92, 565 A.2d 152 (1989), *cert. denied*, 107 S.Ct. 1030 (1990), that assertions of the right to counsel in response to *Miranda* warnings, *i.e.*, assertions of the right to remain silent until after consulting with counsel, do not fall within the scope of *Greenfield*. There the state desired to present evidence of three spontaneous statements of an accused after the assertion of the right to counsel in response to *Miranda* warnings. Two of the statements, one a question concerning the relative competence of public defenders, the other a question to a judge as to how he could meet with the public defender in jail, "[were] not remotely indicative of the Appellee's intent to remain silent." *Hunsberger*, 565 A.2d at 155. Ironically, the Pennsylvania court affirmed the suppression of the third statement, which was a question by the accused to a district attorney as to whether she was his lawyer, and a statement that he did not want to talk to her further when he discovered she was not, because the statement "does tend to imply that he would

speak only to his attorney." *Id.* This, of course, after the accused asserted his right to remain silent by responding to the *Miranda* warnings by stating "that he wished to speak with an attorney." Id., at 153. In sum, *Hunsberger* supports Mr. Galimanis' position, not the state's.

Thus, the state's petition presents no "unresolved" issues, no conflicts among courts, and does not merit granting of the writ.

B. THE ISSUE PRESENTED TO THIS COURT WAS NOT PRESENTED TO THE STATE COURTS BELOW.

The state's claim that Mr. Galimanis did not assert his right to remain silent by demanding counsel before further interrogation by Officer Keiser, and that the state's evidence and arguments thereupon were not evidence and arguments about the assertion of that right, thus presenting a basis for distinguishing *Wainwright v. Greenfield* 474 U.S. 284 (1986) and *Doyle v. Ohio*, 426 U.S. 610 (1976), is not ripe for this court to review since the state courts have never had an opportunity to rule on the issue. The state did not make such an argument to the Colorado Court of Appeals or Supreme Court.

Under Colorado law, the state's failure to present the argument to the Colorado Court of Appeals, at least in the Petition for Rehearing, precluded the state's raising the argument in the Colorado Supreme Court. Colo. App. Rules 40, 52. *See* Appendix 3. Since there was no ruling by the Colorado Court of Appeals on the substantive issue on which the state petitions, namely the purported distinction between the assertion of the right to remain silent and the assertion of the right to remain silent until an attorney has been consulted, there has been no decision which conflicts with another court's ruling on the same issue. Further, since the Colorado Court of Appeals was never presented with the issue which the state contends exists here, that court has not decided the "important question of federal law" which the state contends should be decided by this court. Thus, the grounds relied upon by the state under this Court's Rules 10.1 simply do not exist. Given the state's failure to suggest the current distinction or factual scenario below, it is not surprising that the

Colorado Court of Appeals' opinion does not reflect the disagreement with another court's decision which the state contends it does. It reflects instead a straightforward application of this court's decision in *Greenfield*.

C. THE EXISTENCE OF NUMEROUS OTHER, UNRESOLVED ISSUES PERTAINING TO THE PERTINENT EVIDENCE AND ARGUMENTS, AS WELL AS ANOTHER UNCHALLENGED ERROR DURING THE SANITY TRIAL, WOULD RESULT IN A PURELY ADVISORY OPINION FROM THIS COURT.

Mr. Galimanis raised the issues to the Colorado Court of Appeals and Supreme Court that the state's use of evidence of his assertions of his rights to counsel and to remain silent as evidence of sanity, and its arguments concerning that evidence, violated the Fifth and Sixth Amendments by penalizing the assertions of those fundamental rights. *See e.g.*, *Spevak v. Klein*, 385 U.S. 511 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Griffin v. California*, 380 U.S. 609 (1965). Mr. Galimanis also claimed that the introduction of that evidence violated the federal constitutional right to remain silent and right to counsel under *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1981). It seems plain that the second, police-initiated advisement and the subsequent assertion of rights were in done in violation of *Edwards v. Arizona*'s proscription of such police practices. The Colorado Court of Appeals predictably did not address those issues since it reversed under *Greenfield*. These other issues also interweave with the issues presented by the state. Any attempt by this Court to resolve only a portion of the total legal scenario of this case would almost surely result in a convoluted and extremely narrow holding.

The Colorado Court of Appeals did rule that the trial court's suppression of evidence of a lay opinion of Mr. Galimanis' mental condition by his mother was error, but did not address "whether the error is reversible." *People v. Galimanis*, 765 P.2d 644, 648 (Colo. App. 1989).

Thus, any decision by this Court on the very narrow legal and factual grounds which the state's petition at best presents would not provide the state with any relief. This Court at most would merely be able to remand the cause to the Colorado Court of Appeals for resolution of the numerous other issues.

D. THE COLORADO COURT OF APPEALS' HOLDING THAT THE ERROR WAS NOT HARMLESS IS UNWORTHY OF REVIEW SINCE IT PRESENTS A PURELY FACTUAL AND CASE-SPECIFIC ISSUE, AND THAT COURT PLAINLY APPLIED THE CORRECT LEGAL STANDARD AND CONSIDERED THE RELEVANT FACTS AND CIRCUMSTANCES IN ARRIVING AT ITS CONCLUSION.

The state must prevail on both of its issues in order to gain relief in this case, since it admits error as to the admission of evidence of the second assertion of rights by Mr. Galimanis. The state does not contend that the Colorado Court of Appeals applied an incorrect legal standard in its determination that the error was not harmless beyond a reasonable doubt. The state does not and could not justifiably contend that the Colorado Court of Appeals failed to consider relevant facts or circumstances of this case in arriving at its decision that the error was not harmless. Rather, it contends only that the state court arrived at an incorrect decision on the narrow facts of this case.

The Colorado court plainly applied the correct standard and considered the appropriate criteria. It held:

> The record shows that a motion *in limine* was filed by the prosecution for the sole purpose of admitting the evidence. There was considerable testimony offered to show that defendant was insane, and the statements in question were admitted solely for the purpose of attempting to show defendants' rationality shortly after his apprehension. Also, considering the prosecution's reliance upon the evidence throughout the proceedings, we conclude that the error was not harmless beyond a reasonable doubt. *See United States v. Remigio*, 767 F.2d 730 (10th Cir. 1985), *cert. denied*, 474 U.S. 1009, 106 S.Ct. 535, 88 L.Ed.2d 465 (1985).

People v. Galimanis, 765 P.2d at 648.

Since the Colorado court applied the correct standard and considered the proper criteria, its decision is simply not properly a matter for this court's review.

The state's attempted distinction of the bifurcated nature of the sanity trial is spurious in light of this Court's holding in *Greenfield* rejecting Florida's virtually identical argument that "proof of sanity is significantly different from proof of the underlying offense, and that the *Doyle* due process rationale thus does not apply." 474 U.S. at 292.

> We find no warrant for the claimed distinction in the reasoning of *Doyle* and of subsequent cases. The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining a conviction. The implicit promise, the breach and the consequent penalty are identical in both situations."

Greenfield, 474 U.S. at 292.

The state offers no rationale in support of its proffered distinction that was not rejected by this Court in *Greenfield*.

It is worth noting that in Colorado, contrary to other jurisdictions, sanity is not merely a discretionary statutory affirmative defense, but is an actual essential element of the guilt of the accused in every case in which the issue exists. *Parks v. District Court*, 180 Colo. 202, 503 P.2d 1029 (1972); *People ex rel Juhan v. District Court*, 165 Colo. 253, 439 P.2d 741, 746 (1968). The state's attempt to draw a distinction between sanity and the other elements of the charged offenses fails as a matter of state law. *Doyle v. Ohio*, 426 U.S. 619 (1976) applies directly to the sanity trial in this case since the issue was "guilt" in the same sense as in *Doyle*. In any case, in *Greenfield*, this Court rejected the distinction between sanity

determinations and trials on the "not guilty" plea which the state relies upon here.

The state does not supply this Court with an adequate factual basis upon which to decide whether to review the Colorado court's decision. The petition contains no citations to the record. The record in this case is quite lengthy, thirty seven (37) volumes, and the evidence of Mr. Galimanis' severe, debilitating mental illnesses is voluminous. Further, the state's recitation of the facts can only lead this court to an improvident decision. For example, the state omits from the petition any mention of its arguments during opening statements at the sanity trial, where it contended that the evidence of assertions of rights was evidence of sanity. It fails to provide this court with other statements of the prosecutors during the trial regarding Mr. Galimanis' assertions of rights. Its assertions that it did not rely heavily on the assertions of rights at the sanity trial are thus not worthy of credence. It presents selective and out-of-context descriptions of Mr. Galimanis' illnesses in order to bolster its harmless error contention. While Mr. Galimanis has attempted to provide this Court with many of these obviously important facts, he cannot guarantee this Court that he has supplied this Court with such a complete view of the pertinent facts as this Court might require.

It is for reasons such as these that this Court should be loathe to decide to review a state court's legally sound determination that an error was not harmless.

E. THE COLORADO COURT OF APPEALS' DECISION TO REVERSE IS BASED ON ONLY ONE OF THE TWO VIOLATIONS OF *WAINWRIGHT V. GREENFIELD*, AND THUS ANY DECISION BY THIS COURT ON THE MERITS OF THAT DECISION WOULD BE SPECULATIVE AND COULD NOT RESULT IN A JUDGMENT FOR THE STATE.

The Colorado Court of Appeals' decision to reverse the sanity judgment is based on only one of the two violation of *Wainwright v. Greenfield* which occurred in this case. While

the state presented evidence of and arguments concerning *two* separate advisements and assertions of rights by Mr. Galimanis, and both were the subject of Mr. Galimanis' appeal, the Court of Appeals' opinion is patently singular. *E.g.*:

> In the present case, after being given *a Miranda* advisement, defendant asserted his right to an attorney before questioning by police. This **assertion** was used by the People as probative of defendant's sanity at his sanity trial.

People v. Galimanis, 765 P.2d at 647 [boldface emphasis added].

Any decision by this Court to review that court's decision would result in unavoidable speculation about which of the two incidents formed the basis of the reversal. Further, the state's arguments concerning the first of the two incidents may well be, and should be presumed to be superfluous. Review of the Colorado Court's decision that the error it addressed was not harmless would be speculative. Further, any decision by this Court would be of no ultimate use to the state since the same result would only occur based on the other incident of error.

F. AS DEMONSTRATED BY THE DEARTH OF LITIGATION AND CONTROVERSY ABOUT THE RULE OF *DOYLE* AND *GREENFIELD*, THE STATE'S PURPORTED DISTINCTIONS OF THIS COURT'S PRIOR DECISIONS WOULD SERVE ONLY TO CLOUD BRIGHT LINE RULES WHICH WORK WELL.

This Court's rulings in *Greenfield* and *Doyle* are the subject of little litigation and less controversy. This is because they are bright line rules, easy of application, with strong underlying principles. As demonstrated by Mr. Galimanis' case, they do not result in the state being unable to prosecute cases. The state called eight police officers to testify about Mr. Galimanis' conduct and statements after his arrest. This court recognized as much in *Greenfield*, 474 U.S. at 294-295:

> [T]he State's legitimate interest in proving that the defendant's behavior appeared to be rational at the time of his arrest could have been served by carefully framed questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel. What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurances that the invocation of those rights will not be penalized.

As noted in A., above where it is revealed that the allegedly inconsistent ruling of the Pennsylvania Supreme Court in *Comm. v. Hunsberger*, 523 Pa. 92, 565 A.2d 152 (1989), is nothing of the sort, there is none of the "confusion and conflict" which the state alleged exists and need be addressed by this court.

Thus, there is no substantial reason for this court to undertake the process of sorting through the facts and circumstances of this complex and multi-faceted case. The rule works, there is no need to fix it.

RESPONSE TO THE STATE'S ARGUMENT I.

The state contends that the Colorado Court of Appeals erred by applying *Wainwright v. Greenfield*, 474 U.S. 284 (1986), and *Doyle v. Ohio*, 426 U.S. 610 (1976), where an accused demanded counsel before further interrogation in response to the *Miranda* warnings, as opposed to a situation where the accused did not demand counsel and only "asserted the right to remain silent," and where the prosecution did not "comment upon an accused's silence," but "only . . . comment[ed] upon the exercise of the right to counsel." State's petition at 10. Neither the factual predicates nor the legal bases for the state's contentions bear scrutiny.

The state's contention is apparently that an accused's demand that he not be interrogated without the presence of counsel, made after *Miranda* warnings, is not an assertion of the right to remain silent, but is in fact merely an assertion of the right to counsel, meaning that the rationale of *Doyle* and *Greenfield* should not apply. Petition at 10. As noted in A., above, this Court decided this precise point contrary to the state's position in

Greenfield. *See* 474 U.S. at 295, n. 13 and accompanying text.

Further, the state's argument misapprehends the facts of Mr. Galimanis' case and incorrectly characterizes the state's use of the evidence in this case.

The state's argument is directed only at the evidence and argument relating to Mr. Galimanis' assertion of his rights to Officer Keiser. Keiser read the *Miranda* warnings to Mr. Galimanis and inquired whether Mr. Galimanis understood those advisements. Then the officer began asking Mr. Galimanis questions without inquiring whether he wished to waive those rights.[4] As anticipated by *Miranda*, *Edwards v. Arizona*, 451 U.S. 477 (1985), *Greenfield* and the *Miranda* warnings given him by Officer Keiser, Mr. Galimanis asserted his right to remain silent by informing the policeman that he wanted an attorney. It is simply remarkable that the state now contends that something else was understood by Mr. Galimanis, Officer Keiser, the prosecution or the jury.

In the factual context of this case it is simply not reasonable to suggest that Mr. Galimanis' assertion of rights was not an assertion of the right to remain silent, that the evidence was not evidence of the assertion of the right to remain silent, or that the state's argument and comments were not arguments and comments on the assertion of the right to remain silent. Neither Mr. Galimanis nor any juror would have interpreted the *Miranda* advisements or Mr. Galimanis' assertion or the prosecutors' arguments and comments as the state suggest they must be. Just as this Court recognized in *Greenfield*, there is no rational basis for drawing a line between the right to remain silent and the right to remain silent until consulting with an attorney. The state suggest no basis for that distinction, nor did the state see such a distinction before its petition to this court. As noted in B. above, the prosecution throughout the trial and appeal in this case either referred to the assertion of

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4. The state's implied and express assertions that the police had reason to think that Mr. Galimanis was armed with a gun, petition at 4, 12. are totally false. The record does not contain any evidence or allegation to support such a notion. Although the rationale behind the state's reliance upon *New York v. Quarles*, 467 U.S. 649 (1984) is not apparent, since there was no basis in fact for the inquiry by Officer Keiser it cannot be used as a means for circumventing the Due Process Clause.

the right to counsel along with the right to remain silent as the unit they clearly are, or it lumped together the assertions of "rights" without any of the supposedly critical differentiation it now claims. There is no reason whatsoever to think that Mr. Galimanis or the jury recognized a distinction which the prosecutor missed for seven years.

The state's characterization of the evidence and its arguments as merely presenting an assertion of the right to counsel is not supported by the record. Further, the state's statement of the proceedings and evidence badly distorts the manner in which and purposes for which the state used the evidence. In fact, the state overtly considered, and urged the jury to consider the evidence, as evidence of the assertion of the right to remain silent, which it obviously was in any case. Thus, the state's attempted distinction between assertions of the right to counsel and right to remain silent, if it had any validity otherwise, simply did not exist in this case due to the prosecution's own actions and statements.

This case differs from *Greenfield* only in that here the constitutional violations by the state were more numerous and more egregious and the objections to them better preserved.

The state successfully moved to present the evidence over Mr. Galimanis' objection. Thus, unlike *Greenfield*, where only the final arguments were objected to, all of the evidence and resulting comments and arguments were admitted and made over objection. Unlike *Greenfield*, where only the prosecutor's actual arguments, *i.e.*, the state's ultimate and *express* use of the evidence was at issue, here the prosecution's actual arguments are not the only inquiry. *See* concurring opinion of Chief Justice Rehnquist in *Greenfield*, 474 U.S. at 301, which makes this distinction but nevertheless joins in the decision. Every aspect of the state's evidence and argument at this case is open to inquiry, and that inquiry makes it clear that the state did not recognize or respect the distinction it relies upon so completely now.

It is no wonder that the state has never made this argument before.

Further, contrary to its arguments to this Court, the state successfully moved to have all of its evidence considered to be affirmative evidence of sanity, **not rebuttal of the accused's evidence of insanity.**[5] The state's assertions of the "rebuttal" nature of the

pertinent evidence are disingenuous and, as a matter of the facts and law of this case, false. In order to prevail the state apparently must have this Court "find" the opposite of what it already successfully urged the state court to find.

The state argued the assertions of rights as follows during its opening statement:

> So they take the defendant and they put him in Al Keiser's patrol car. While he is there, Al Keiser orally advises him of his *Miranda* rights, the rights you have probably all heard on TV a number of times. He does this orally and the defendant responds he understands and he says I want my lawyer. (vol. 8, p. 22)
>
> You will hear from Detective Light, who, down at the Denver Police Department, advises the defendant of the nature of the charge, what he was being held for, first degree murder. A written advisement form was used which you will see which outlines the *Miranda* warnings that Al Keiser gave orally. Those were explained to the defendant. He said he understood. He sat back in his chair and said I want my lawyer here. (vol. 8, p. 24-25)

Since, in law and common sense fact, a demand for an attorney is an assertion of the right to remain silent, here the state was contending that the assertion of those rights was evidence of sanity, just as the court had ruled it could contend. No such uncontested arguments occurred in *Greenfield*.

Defense counsel made **no** opening arguments and called **no** witnesses throughout the trial regarding Mr. Galimanis' conduct after arrest. They did not examine any expert witness regarding the matter. They **only** cross-examined witnesses called by the state in its effort to show that Mr. Galimanis acted rationally and normally after the arrest. Any intimation to the contrary in the state's petition is incorrect.[6]

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5. The state moved *in limine* at the outset of the trial to have the court rule that its evidence be considered part of its case in chief, not as "rebuttal" evidence. The court granted that motion. (vol. 1, p. 89; vol. 7, p. 2-5)

6. For example, at page 7, in the midst of its recitation of the evidence presented by Mr. Galimanis at trial, the state alleges that, "Respondent also elicited how a deputy sheriff called by the prosecution noted "suicidal ideation" on a written form completed a few hours after respondent's arrest and how this same officer recommended counseling for him." In fact, that officer was called out of order as a favor to the state, and the state called him solely to testify as to Mr. Galimanis' allegedly normal behavior after his arrest. Truly, during cross

In *Greenfield*, the evidence consisted of testimony of police officers that the accused had refused to speak to them but had demanded an attorney when given *Miranda* warnings. The evidence here was not only the of the same type from Officer Keiser and Detective Light, but further testimony from three psychiatrists, all under the state's questioning, of the importance of the assertions of rights, *i.e.*, the refusal to cooperate with the police, in a psychiatric sense. The state's failure to provide this Court with that critical testimony from the two defense experts it cross-examined, while duplicating the testimony of its own psychiatrist, is indicative of the caution this Court should exercise in this matter.[7]

The first actual evidence of the assertions of rights came during the state's cross-examination of Dr. Miller, an experienced forensic psychiatrist called as a witness by Mr. Galimanis, who concluded that Mr. Galimanis was obviously severely mentally ill. The prosecutor asked:

> Q: All right. Did you read the reports from Wheat Ridge and Denver concerning descriptions of his behavior while he was in the patrol car and also being advised of *his rights, asserting his rights*?
>
> A: Yes.
>
> Q: Isn't it true that in a forensic examination, that kind of evidence is important?
>
> A: It was important.
>
> Q: It was?
>
> A: Yes.
>
> Q: It shows some awareness of what is going on, the fact that he is charged with something very serious, *he elects to preserve his rights, to defend himself against those charges*; is that

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examination his assertions of normalcy were refuted by his admissions that he had noted "suicidal ideation" and recommended counseling.

7. The state's insistence that it was merely responding to, or "rebutting" defense evidence with its extensive evidence of Mr. Galimanis' assertions of rights, is totally unfounded.

right?

A: It shows some awareness of that, probably. (vol. 11, p. 136-137, emphasis added).

The state also cross-examined Dr. Kathy Morall, another experienced forensic psychiatrist who testified that Mr. Galimanis was insane and severely mentally ill, on the same issue. After establishing that Dr. Morall had read and considered the police reports, the prosecutor asked her:

Q: Do you remember when the police came, they arrested him?

A: Yes.

Q: And they took him into custody?

A: Yes.

Q: And they read him his rights?

A: Yes.

Q: And he said, "I want my lawyer?"

A: Yes. (vol. 10, p. 91-92)

Later, the following occurred:

Q: We're not isolating it here. We are giving a whole bunch of facts which outline his activities, which shows not random but given his options some fairly rational things of what he was doing?

A: I guess my interpretation of it would be giving

Q: And he even tells you where he's arrested, South Yates Way, **and don't you think when someone is arrested and they are told, you are being charged with first degree murder and they read your rights to you, isn't it a natural response not to incriminate yourself? You don't want to tell them something that is going to make it easier?**

A: There is an urgency to questions. I don't know that that would be a general statement I would agree.

Q: Don't you think someone who is charged with first degree murder is going to be aware there is a relative risk here to him?

A: It could be.

Q: That's one way of looking at it, right?

A: You could look at it.

Q: That's an inference you could draw from those facts, right?

A: Yes.

Q: That would be a reasonable inference?

A: I wouldn't draw them -- I wouldn't say someone else is being unreasonable. (vol. 10, p. 96-97, emphasis added.)

The state admits it also questioned its psychiatrist, Dr. Wahl, on the assertion of rights. The state's central assertion that its question: "And were you aware of the defendant's request for a lawyer upon his arrest, as well as his general appearance and demeanor, at that time?" did not relate to or call for any mention of the refusal to speak to the police, petition at 13, is obviously unfounded, for several reasons. The immediately preceding question: "Did you have the opportunity to review reports compiled by both police officers form the Denver Police Department, as well as officers from the Wheat Ridge Police Department pertaining to the defendant's arrest on April 21?" related directly to both the assertions to Officer Keiser and the assertions to Detective Light, which the state admits were assertions of both the right to remain silent and right to counsel.

In light of this record and the common sense and legally necessary principle that Mr. Galimanis was asserting his right to remain silent when he told Officer that he wanted an attorney, the state's assertion in its petition that "the brief mention of [Mr. Galimanis'] silence by Light and Wahl" was harmless error is a mere manipulation of the record.

In *Greenfield* the prosecution argued that Mr. Greenfield's statements that he understood his rights, that he did not want to speak to the police and that he wanted to speak to an attorney, showed "an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act," and thereby, his sanity. *Id.*, 474

U.S. at 287, n. 2. The prosecution did not limit or even direct its arguments specifically to the right to remain silent as opposed to the right to counsel, just as this Court did not limit its holding in that case.

Here, in addition to its opening statements and its comments and arguments with Mr. Galimanis' witnesses, the prosecution argued as set forth by the state in Appendix H. The state referred to the exercise of rights as the "most telling" facts, and it made virtually the same argument which constituted reversible error in *Greenfield*. The prosecutor recognized then that the assertions of right to Light and to Keiser meant "the same thing."

Throughout trial the state repeatedly and consistently characterized the evidence as evidence of Mr. Galimanis' assertion of his "rights." Given the *Miranda* warnings themselves, and the evidence presented of them by the state's witnesses, these numerous comments can only be interpreted to refer to assertions of the right to remain silent **and** the right to counsel before interrogation.

Thus, the "unresolved question" has been resolved, and, in any case, is so easily answered based on well-established law, common sense and the facts of this case that it hardly merits this Court's attention.

RESPONSE TO STATE'S ARGUMENT II.

The state admits that the introduction of the evidence of Mr. Galimanis' assertion of rights to Detective Light and the prosecutorial comments thereupon were error under *Wainwright v. Greenfield*, 474 U.S. 284 (1986) and *Doyle v. Ohio*, 426 U.S. 610 (1976). Petition at 12-13, 14. It contends that these errors were harmless for several manifestly inconsistent reasons, none of which bear scrutiny. In fact, the harmless error allegations are completely unfounded in fact and law.

The state's assertions that it did not comment on the exercise of rights is patently incorrect. It did so repeatedly. Its distinction between the right to remain silent and right to remain silent until consulting with counsel is baseless, given this Court's common sense

holding in *Greenfield* that an assertion of the right to remain silent until consulting with an attorney is indistinguishable from the assertion of the right to remain silent, the facts of this case, *i.e.*, the warnings given Mr. Galimanis and his statements, and the state's comments, characterizations and arguments regarding that evidence.

The state does not contend that the admission of the evidence of the first assertion of rights and the state's comments thereupon were harmless, if erroneous. Since this Court expressly decided the question presented here by the state in its first Argument in *Greenfield*, there can thus be no argument that the multiple errors were harmless.

Further, as noted above, since the Colorado Court of Appeals' holdings of error and that the error was not harmless were based on only one of the two assertions of rights by Mr. Galimanis in this case, the state's harmless error argument must fail. Any review of that holding by this Court would be plainly speculative.

The state begins its argument with the assertion that the bifurcated nature of the sanity trial in Mr. Galimanis' case presents a novel and critically different situation than in *Greenfield*. The state suggests that this is so because silence after *Miranda* warnings is "insolubly ambiguous" and is thus of minimal relevance or probative value in a sanity trial. This hollow argument is based on a misapprehension and misstatment of the bases of this Court's decisions in *Doyle* and *Greenfield*, and is belied by the state's heavy emphasis at trial on precisely the evidence it now asserts is essentially irrelevant.

Initially, the connection between the bifurcated trial and the allegedly "insolubly ambiguous" nature of the evidence and arguments is a mystery. The state suggests no substantive reason why the evidence and arguments are more ambiguous, or their use less unfair, because of the bifurcated trial. Thus, the state offers distinctions without a difference.

Further, this Court explicitly rejected the State of Florida's argument in *Greenfield* that the use of the accused's silence during a sanity proceeding was significant. 474 U.S. at 292-293. See part D., above. The state merely re-hashes the arguments this Court resolved

in *Doyle* and *Greenfield*. Thus, in essence the state's "novel" distinction has already been found to be insignificant by this Court.[8]

This Court based its decisions in *Doyle* and *Greenfield* primarily on the unfairness of the state's use of silence when it had implicitly assured the accused that such silence would not be used. In *Greenfield* Florida argued, as the prosecution did at the trial in this case, that the evidence of the assertions of rights was especially probative of sanity. This court responded:

> "We need not evaluate the probative value of respondent's silence to reject this argument. For the ambiguity of the defendant's silence in *Doyle* merely added weight to the court's principle rationale, which rested on the implied assurance contained in the *Miranda* warning. [Citations and footnote omitted.] The Attorney General's argument about the probative value of silence therefor fails entirely to meet the problem of fundamental unfairness that flows from the State's breach of its implied assurances."

Greenfield, 474 U.S. at 293-294.

Thus, even if the underlying assertion that the bifurcated sanity trial resulted in some more "ambiguity," the state would not be entitled to relief.

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8. This Court's holding in *Greenfield* rejecting Florida's virtually identical argument that "proof of sanity is significantly different from proof of the underlying offense, and that the *Doyle* due process rationale thus does not apply." 474 U.S. at 292, is dispositive.

> We find no warrant for the claimed distinction in the reasoning of *Doyle* and of subsequent cases. The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining a conviction. The implicit promise, the breach and the consequent penalty are identical in both situations."

Greenfield, 474 U.S. at 292.

The state offers no rationale in support of its proffered distinction that was not rejected by this Court in *Greenfield*.

Further, the ambiguity of such assertions of rights was *a* reason why this Court ruled in *Doyle* and *United States v. Hale*, 422 U.S. 171 (1975) that such evidence and arguments were improper. The state condemns its own argument.

When it moved for the introduction of the evidence, the state alleged that it was "clearly probative of the defendant's mental state at a time close in proximity to the date of the occurrence." (vol. 1, p. 83) The state's present contrary position is disingenuous.

The state's attempt to minimize the importance of its evidence of and arguments concerning the assertions of rights is belied by the state's statements, arguments and positions during trial. As noted above and by the Colorado Court of Appeals, and as is immediately obvious from the facts and proceedings of this case, the state's position at trial was that the evidence of assertions of rights was extremely probative and important to its case, indeed, that *it was the "most telling" evidence of Mr. Galimanis' sanity*. (See prosecutor's closing argument.) The state filed a pretrial motion asking leave to introduce the evidence on the ground that it was "clearly probative"; it argued the evidence as relevant in opening statements; it called two witnesses to testify extensively about the assertions of rights; it cross-examined two of Mr. Galimanis' experts about the assertions of rights; it asked its own expert about the assertions of rights, and it described the evidence as the "most telling" evidence of Mr. Galimanis' sanity.

The state does not contend that the Colorado Court of Appeals applied an incorrect legal standard in its determination that the error was not harmless beyond a reasonable doubt. The Colorado court plainly applied the correct standard and plainly considered the appropriate criteria. It held:

> The record shows that a motion *in limine* was filed by the prosecution for the sole purpose of admitting the evidence. There was considerable testimony offered to show that defendant was insane, and the statements in question were admitted solely for the purpose of attemtpting to show defendants' rationality shortly after his apprehension. Also, considering the prosecution's reliance upon the evidence throughout the proceedings, we conclude that the error was not harmless beyond a reasonable doubt. *See United States v. Remigio*, 767 F.2d 730 (10th Cir. 1985), *cert. denied*, 474 U.S.

1009, 106 S.Ct. 535, 88 L.Ed.2d 465 (1985).

People v. Galimanis, 765 P.2d 644, (Colo.App. 1988).[9]

Given that the Colorado Court of Appeals applied the correct legal standard and considered the proper criteria, its decision is simply not properly a matter for this court's review.

The state's only allegations are that that court failed to appreciate the significance of the bifurcated proceeding and that it made a mistake, based on the unique facts of this case. As noted above, since the state is completely unable to suggest a substantive reason, or one not already rejected by this court in *Greenfield*, why the bifurcated trial made the use of the assertions of rights less unfair or less prejudicial, it is no wonder that the Colorado Court of Appeals did not expressly consider that phantom issue. This Court should not grant the writ merely to consider whether a state court which has facially addressed the proper criteria and applied the proper legal standard made a mistake in its conclusion that constitutional error was not harmless.

The state does not contend that there was "overwhelming" evidence of sanity, for obvious reasons. Mr. Galimanis presented extensive and compelling evidence of severe, long-standing mental illnesses, and testimony from highly qualified experts that he was legally insane. The state's own witnesses, called to recount his "normal" behavior at the time

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9. *United States v. Remigio*, 767 F.2d 730 (10th Cir. 1985, *cert. denied*, 474 U.S. 1009 (1985), contains the following analysis of such a harmless error analysis:

> In [*United States v. Massey*, 687 F.2d 1348 (10th Cir. 1982)] we delineated five factors which are relevant to determining whether the comments are harmless, these factors include:
>
> "1. The use to which the prosecution puts the postarrest silence.
> 2. Who elected to pursue the line of questioning.
> 3. The quantum of other evidence of guilt.
> 4. The intensity and frequency of the reference.
> 5. The availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions."
>
> 687 F.2d at 1353, citing *Williams v. Zahradnick*, 632 F.2d 353, 361-362 (footnotes omitted) (4th Cir. 1980).

of his arrest, told of his often quite strange behavior at that time.[10] Its lay witnesses, called to recount his "normal" behavior before his arrest, testified as to more extremely strange behavior.[11] Its one expert witness, Dr. Wahl, who had never before testified on the issue of sanity, incredibly admitted that he was unaware of any evidence of psychosis in Mr. Galimanis' history, after Mr. Galimanis had been involuntarily committed in 1981 because he was dangerously psychotic, and after he remained psychotic for some months thereafter despite heavy drug therapy. Further, Dr. Wahl admitted that he ultimately agreed with the diagnosis of other psychatrists that Mr. Galimanis suffered from borderline personality disorder, which necessarily involved psychotic episodes. He contended that Mr. Galimanis would have been shocked out of his psychosis by the action of cutting his girfriend's head off. He did not address the fact that she had already been beaten and stabbed several times, perhaps fatally, before the decapitation began.

The state's assertion of "substantial" evidence that Mr. Galimanis was not psychotic begs the question of whether a violation of constitutional rights is "harmless."

The remaining arguments by the state are either mere re-hashings of the arguments this court rejected in *Greenfield* and *Doyle*, or are *non-sequiturs*, unworthy of this Court's attention.

CONCLUSION

For the foregoing reasons this Court should deny the Petition for Writ of Certiorari.

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10. As noted by the Colorado Court of Appeals. 765 P.2d at 645-646: "When awakened, he was somewhat incoherent and disoriented." The record reveals that Mr. Galimanis was sleeping in blood soaked jeans in the car belonging to the girlfriend he had recently killed, he had no money, he carried on a laughing conversation with himself, he was primarily and apparently *only* concerned with the car, he repeated his last name numerous times for no visible reason, and even the police noted his "suicidal ideation" and that he needed counseling.

11. For example, one state's witness recounted Mr. Galimanis' usual behavior of sitting in his dismantled auto for hours, honking the horn, and his actions a few days before the killing of walking for hours back and forth on a basketball court, slowly disrobing.

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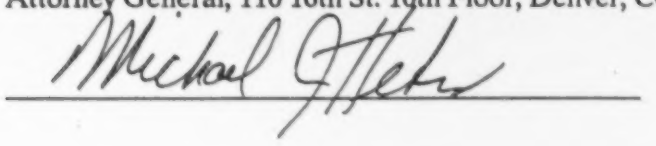
CERTIFICATE OF SERVICEU

I certify that the foregoing Brief in Opposition to the Petition for Writ of Certiorari was served on Gale Norton, attorney for the Petitioner, by depositing a copy of the brief in the United States Mail, postage paid, on May 30, 1991, addressed to Ms. Gale Norton, Attorney General, 110 16th St. 10th Floor, Denver, CO, 80202.



APPENDIX 1

RECEIVED
District Court
Jefferson

DISTRICT COURT, JEFFERSON COUNTY, COLORADO

NO. 83CR364 DIVISION 8

AUG 1[illegible]

MOTION IN LIMINE-III

JEFFERSON COUNTY, COLORADO

Division C

Enter

FILE

AUG 19 1983

FILED IN THE DISTRICT COURT

THE PEOPLE OF THE STATE OF COLORADO

v.

PHILIP LESLIE GALIMANIS,

Defendant.

NOLAN L. BROWN, District Attorney in and for the First Judicial District, County of Jefferson, State of Colorado, requests the Court enter the following orders regarding the procedure to be utilized in the sanity trial.

[1] That the Court in its discretionary power designate the order in which the proof comes before the jury.

[2] That the Court designate whether the presumption of sanity is the People's case in chief.

AND AS GROUNDS THEREFORE STATE:

[1] The Court has discretion to designate the order in which the proof comes before the jury. Elliott v. People, 400 P. 2d 687 (1971). C.R.E. 611 (a).

[2] The presumption of sanity is not evidence, its primary purpose is one of procedural convenience. People v. Kernanen, 497 P. 2d 8 (1972). It is no more than a rule of evidence. Gomez v. Dist. Court, 500 P.2d 134 (1972).

[3] The presumption retains its vitality until some evidence to the contrary is presented. People v. Johnson, 503 P.2d 1019 (1972).

[4] Whether the defendant has raised the issue sufficiently to rebut the presumption of sanity is initially a question of law. People v. Johnson, 503 F.2d 1019 (1972).

[5] That "any" even "token" evidence of insanity is sufficient to overcome the presumption of sanity. People v. Ware, 528 P.224 (1979) C.R.S. 1973, 16-8-105 (2).

[6] Once the Court makes this determination, the burden of proof is on the People to prove sanity beyond a reasonable doubt. People v. Wright, 648 P.2d 665 (1972). People v. Ware, supra.

WHEREFORE the People request the Court to designate that if the defense presents "token" evidence of insanity to rebut the presumption, the People's case in response to this will be their case in chief and that the presumption of sanity is not the People's case in chief.

NOLAN L. BROWN
District Attorney

By _____ 8587
Steve Jones, Reg. No. 8587
Deputy District Attorney

CERTIFICATE

I hereby certify that I have this 19th day of August, 1983, delivered to the Public Defender's Office two copies of the above and foregoing Motion in Limine III.

_____

APPENDIX 2

DISTRICT COURT, JEFFERSON COUNTY, COLORADO

Criminal Action No. 83CR0364, Division 8

REPORTER'S TRANSCRIPT VOLUME 1

84CA0209

RECEIVED JUN 6 1985 GARY SOURE Clerk, Court of Appeals

FILED IN THE COURT OF APPEALS STATE OF COLORADO JUL 29 1985 GARY SOURE Clerk, Court of Appeals

THE PEOPLE OF THE STATE OF COLORADO,

v.

PHILIP LESLIE GALIMANIS,

Defendant.

The sanity trial in this case was held on August 22 through September 1, 1983 before the HONORABLE MICHAEL C. VILLANO, Judge of the District Court, and a jury of twelve.

This volume contains the proceedings held on August 22 and 23, 1983. Morning session of August 24, 1983.

For the People: STEVE JONES, No. 8587
MARY A. MALTESTA, No. 9837
Deputy District Attorneys

For the Defendant: ALEXANDER GARLIN, No. 7497
VICTORIA J. KOURY, No. 9805
Deputy State Public Defenders

AUGUST 22, 1983

THE COURT: 83CR364, The People of the State of Colorado versus Philip Galimanis. Counsel please enter their appearances.

MR. JONES: Steve Jones and Mary Malatesta appearing for the People.

MR. GARLIN: Alexander Garlin and Victoria Koury, who's here in the other room, appearing along with Philip Galimanis. He is present.

THE COURT: All right. I have a couple of motions in limine. Would you like to proceed, Mr. Jones?

MR. JONES: Yes. We have three, I believe. The defendant filed a Motion in Limine No. 8 concerning Jim Marston and also we had the defendant's Motion in Limine No. 1 to take up about the pictures. If we could take that up last, the pictures, I will start with the three we have. I would like to make sure the Court has copies of all three of our motions in limine.

THE COURT: Well, what are the other two? I have Motion in Limine 3 which is with regard to the procedure, which I thought I'd already ruled on. I don't understand why you have another motion.

MR. JONES: We just want to get a fix on where we are going to be, given a certain presentation of testimony that is going to occur here. I have no problem with the

Court's earlier order. This motion addresses the procedures after the presumption and any evidence that has been admitted by the defendant. That is the nature of that motion in limine. It has nothing to do with the original one that was filed by Mr. Garlin concerning initial procedure. This occurs afterwards in the presentation of evidence.

Does the Court want me to go forward on that?

THE COURT: Yes.

MR. JONES: Okay. The problem I have, Your Honor, is that it has never been very clear and there seems to be a number of different schools of thought on whether the presumption is the case in chief; in other words, if we do not present any evidence and we rest on the presumption, then the defendant presents some evidence of insanity, and that we respond to that, which we must to meet our burden of proof, whether that would put us in a rebuttal posture at that point. I would argue, Your Honor, that if the defendant puts on token evidence, any evidence or token evidence of insanity just to raise the issue, that the presumption that we talked about before is simply a matter of procedural convenience, it's not a rule of evidence, if there is simply token evidence, our initial case would be our case in chief. At that point, the defendant most likely would put on, if any, their testimony for their case in chief. I think it is no secret here they have a number of witnesses, including six experts, who will

be testifying concerning the defendant's mental illness. If we wish to respond to that, that would put us in a rebuttal posture. So I think it is important to clear up at the outset whether the presumption is the case in chief or whether our initial response to any evidence is our case in chief.

I would argue that if there is token evidence, our initial response is our case in chief and any evidence after that would be their case in chief and then our response would be rebuttal, if any. And I would state just basically what the motion says. It's up to the Court in terms of order of proof. That is what I am talking about here, basically.

I would also note that in the instructions that the Court is going to read to the jury, specifically the one after the jury is impaneled, it contemplates this exact procedure, the instruction right after the panel is sworn, I believe the third, fourth and fifth paragraphs contemplate the exact thing I am talking about here because we always have the burden of proof. This isn't a question of whether or not we have the burden of proof. I am not arguing that. I just want to know where I am at given stages of the trial because the statute is a little bit unclear.

I would submit, then, that if there is token evidence, our case in chief would be our response and then rebuttal after that.

THE COURT: Let me hear from the defense.

MR. GARLIN: Just one thought, Judge, I'd offer briefly, and that is that resting on the presumption of evidence, I think, is essentially doing that in lieu of going forward in any other way. I think if that is what the prosecution choses to do, rest on the presumption of evidence of sanity, excuse me, then any response they make thereafter would be rebuttal.

THE COURT: Well, that is not the position the Court takes. My position is that as Mr. Jones outlined it. I think that is what is contemplated by our courts, is that the raising of the insanity issue is merely procedural. Thereafter, the prosecution will present their case in chief just as we would any other trial and they'll have an opportunity to rebut defense evidence.

MR. JONES: Okay. The other two we can take up, I think, fairly quickly, especially the first one. Our Motion in Limine 1 concerns the testimony of the people from Bethesda and Porter Hospitals. I think it is important for the Court to note, and I would make an offer of proof, that the defendant spent about eight, nine months at Bethesda and Porter Hospitals back in 1981.

THE COURT: When was that filed? I am trying to find a copy of that.

MR. JONES: That was filed right before we had

APPENDIX 3

ver Co. v. Pierson, 674

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rs v. Charnes, 656 P.2d
82).
suant to this rule denied.
653 P.2d 82 (Colo. Ct.

isdiction. See Wickland
App. 403, 565 P.2d 976

tate of Perini, 34 Colo.
3 (1974); In re Trask, 40
P.2d 825 (1978); Sports
iemmer, 42 Colo. App.
9); Applewood Gardens
Richter, 42 Colo. App.
979); In re Erickson, 43
P.2d 909 (1979); In re
op. 128, 613 P.2d 344
d Airlines, 638 P.2d 812
; In re Norton, 640 P.2d
1981); People in Interest
4 (Colo. Ct. App. 1982);
er Nat'l Ass'n v. Pierson,
Ct. App. 1982); Smith v.
Revenue, 661 P.2d 1192

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(e) Costs on Appeal Taxable in the Trial Courts. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the trial court as costs of the appeal in favor of the party entitled to costs under this Rule.

Cross references. As to costs incurred in civil actions in general, see § § 13-16-104 and 13-16-105, C.R.S.

Am. Jur.2d. See 5 Am. Jur.2d, Appeal and Error, § § 1009-1024.

Law reviews. For article, "Appellate Procedure and the New Supreme Court Rules", see 30 Dicta 1 (1953).

Costs, strictly so called, are a matter of statute or rule of court. Antero & Lost Park Reservoir Co. v. Lowe, 70 Colo. 467, 203 P. 265 (1921).

Costs are recoverable only by virtue of the statute allowing them. Phillips v. Corbin, 25 Colo. 567, 56 P. 180 (1899).

Costs are only to reimburse the successful party. Antero & Lost Park Reservoir Co. v. Lowe, 70 Colo. 467, 203 P. 265 (1921).

For all trials of same cause. Where there is more than one trial of the same cause, the successful party is entitled to recover costs for all the trials. Wallace Plumbing Co. v. Dillon, 73 Colo. 10, 213 P. 130 (1922).

And including annexation proceedings. Under this rule the successful party may recover costs incurred in the supreme court upon appeal in annexation proceedings. Phillips v. Corbin, 25 Colo. 567, 56 P. 180 (1898).

Where suit is instituted and prosecuted vexatiously, defendant's attorney fees may be taxed as costs. London v. Allison, 87 Colo. 27, 284 P. 776 (1930).

In action in mandamus to compel a city council to grant a permit, where judgment is for the plaintiff, he is entitled to recover from the defending officials who voted against granting the permit his costs taxed in the trial court, but not from those who voted in favor of granting the permit. City of Colorado Springs v. Street, 81 Colo. 181, 254 P. 440 (1927).

This rule does not include a case dismissed for want of jurisdiction. Bartels v. Hoey, 3 Colo. 279 (1877).

Objection barred after payment of costs. When there is no fraud or wrongful purpose or mistake of fact, one may not object further to a taxation of costs against him after he has paid them, or received payment thereof. Webber v. Phister, 71 Colo. 332, 206 P. 385 (1922).

Rationale for section (b) limitation. The limitation in section (b) stems from the basic concept that costs should not be charged against a sovereign state, unless the proper authority so directs. People in Interest of W.M., 643 P.2d 794 (Colo. Ct. App. 1982).

Applied in In re Trask, 40 Colo. App. 556, 580 P.2d 825 (1978); Caldwell v. Armstrong, 642 P.2d 47 (Colo. Ct. App. 1981).

Rule 40. Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within fourteen days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) Form of Petition; Length. The petition may be typewritten as prescribed in C.A.R. 32 (b), and on the front cover there shall be the number and title of the case, the court from which the appeal was taken, the name

n Schoonover v. Hedlund Abstract
27 P.2d 408 (Colo. App. 1986).

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1 (Colo. 1985).

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No writ of certiorari shall issue
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in the Court of Appeals, except that in workmen's compensation and unemployment insurance cases the time for filing a petition for writ of certiorari is reduced to fifteen days. (Amended June 4, 1987, effective January 1, 1988.)

Rule 52. Review on Certiorari — Time for Petitioning

(b) To Review Court of Appeals Judgment. No writ of certiorari shall issue unless a petition for rehearing has been filed in the Court of Appeals. A petition for writ of certiorari to review a judgment of the Court of Appeals shall be filed not later than thirty days from the date rehearing is denied in the Court of Appeals, except that in workmen's compensation and unemployment insurance cases the time for filing a petition for writ of certiorari is reduced to fifteen days. (Amended and effective June 15, 1972; amended June 4, 1987, effective January 1, 1988.)

When a petition for rehearing of a municipal court judgment is timely filed in the district court, the district court judgment will not become final for purposes of this rule until the district court denies the petition. City of Aurora v. Rhodes, 689 P.2d 603 (Colo. 1984).

Rule 53. The Petition and Cross-Petition for Certiorari

(a) The Petition. The petition for certiorari shall be succinct and shall not exceed twelve pages, exclusive of appendix. The petition shall contain in the order here indicated:

(1) An advisory listing of the issues presented for review expressed in the terms and circumstances of the case but without unnecessary detail. The statement of an issue presented will be deemed to include every subsidiary issue clearly comprised therein. Only the issues set forth or fairly comprised therein will be considered.

(2) A reference to the official or unofficial reports of the opinion or judgment and decree of the court, which shall be in an appendix containing the papers as provided in subsection (6) of this rule.

(3) A concise statement of the grounds on which jurisdiction of the Supreme Court is invoked, showing:

(A) The date of the judgment or decree sought to be reviewed and the time of its entry;

(B) The date of any order respecting a rehearing and the date and terms of any order granting an extension of time within which to petition for certiorari.

(4) A concise statement of the case containing the matters material to consideration of the issues presented.

(5) A direct and concise argument amplifying the reasons relied on for the allowance of the writ.

(6) An appendix containing:

(A) A copy of any opinions delivered upon the rendering of the decision of the Court of Appeals;

(B) If review of a judgment of the district court on an appeal from a county court is sought, a copy of the findings, judgment and decree in question; and

(C) The text of any pertinent statute or ordinance.

Supreme Court, U.S.
FILED
MAY 30 1991
OFFICE OF THE CLERK

(3)

No. 90-1678

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE STATE OF COLORADO
Petitioner

v.

PHILIP LESLIE GALIMANIS
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS

BRIEF OF AMICUS CURIAE COMMONWEALTH OF PENNSYLVANIA AND OTHER AMICI LISTED ON THE INSIDE COVER* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether Wainwright v. Greenfield, 474 U.S. 284 (1986), allows use of a defendant's request for counsel to rebut evidence offered in support of an insanity defense?[1]

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[1]This case presents a second important issue concerning whether mention of the defendant's invocation of silence at the sanity hearing constituted harmless error. The second issue is beyond the scope of this brief.

TABLE OF CONTENTS

Question Presented..... i

Table of Authorities.....iii

Interest of Amici Curiae..... 1

Argument..... 6

A Prosecutor's Use of a Defendant's Request for Counsel, as Evidence of His Ability to Distinguish Right from Wrong, Does Not Deprive the Defendant of Due Process..... 6

Conclusion..... 15

TABLE OF AUTHORITIES

Cases	Page(s)
Commonwealth v. Hunsberger, 523 Pa. 92, 565 A.2d 152 (1989) cert. denied, 110 S.Ct. 1124 (1990)	7,11,12 14
Doyle v. Ohio, 426 U.S. 610 (1976)	7,10
Leland v. Oregon, 343 U.S 790 (1952)	3
Michigan v. Tucker, 417 U.S. 433 (1974)	5
Miranda v. Arizona, 384 U.S. 436 (1966)	6-8,11
M'Naughten's Case, 10 Clark and S. 200, 8 Eng. Reprint 718 (1843)	2
People v. Galimanis, 765 P.2d 644 (Colo.App.1988)	6,9
People v. Wright, 648 P.2d 665 (Colo. 1982)	3
State v. Mauro, 159 Ariz. 186, 766 P.2d 59 (1988)	13
State v. Torrence, 196 Conn. 430, 493 A.2d 865 (1985)	3

Cases (Contd.) Page(s)

United States v. Hartfield,
513 F.2d 254 (9th Cir. 1975)..4

Wainwright v. Greenfield,
474 U.S. 284 (1986).....passim

Statutes

Colo. Rev. Stat. § 16-8-101
(1986).....3

Conn. Gen. Stat. § 53a-13
(rev. to 1991).....3

18 Pa.Cons.Stat.Ann. § 314
(Purdon 1983).....2,3

Pa.Stat.Ann. tit. 50, § 7404
(Purdon Supp. 1990).....2

Miscellaneous

Model Penal Code § 4.01 (1985)....3

INTEREST OF AMICI CURIAE

Amici curiae are States, each of which views a criminal defendant's request for counsel made near the time of the crime as highly relevant to a determination of the defendant's insanity defense. The decision of the Colorado Court of Appeals disallowing such evidence threatens to deprive state prosecutors of evidence necessary to a just determination of an insanity defense. The amici States accordingly support the State of Colorado in urging this Court to review the Colorado Court of Appeals' decision.

State criminal justice systems provide varying approaches to the defense of insanity. In Colorado, as well as in 13 other states,[2] the issues raised by

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[2] See Petition for certiorari, p. 9 n.2, collecting statutes.

a plea of not guilty by reason of insanity must be tried to a separate jury. Most states, like amicus curiae Pennsylvania, do not mandate a bifurcated procedure.[3]

The tests applied for determining criminal responsibility vary[4] as do the assignment of the burden of persua-

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[3]See e.g. Pa.Stat.Ann. tit. 50, § 7404 (Purdon Supp. 1990)(allowing bifurcation "in the interest of justice" and directing that the trial court "consider the substantiality of the defense of lack of responsibility and its effect upon other defenses, and the probability of a fair trial.")

[4]Under the rules established in M'Naughten's Case, 10 Clark and S. 200, 8 Eng. Reprint 718 (1843), the test of mental responsibility is whether the accused "was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong." The rules of M'Naughten's case have been widely adopted and remain the test of criminal insanity in many states. See e.g. 18 Pa.Cons.Stat.Ann. § 314(e)(2), (d) (Purdon 1983). In Colorado where this case arises, the M'Naughten Rule as

sion and the standard of the burden of proof.[5] Regardless of which procedure or which test of criminal

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[4](Continued) modified by the irresistible impulse doctrine applies. See Colo. Rev. Stat. § 16-8-101 (1986); People v. Wright, 648 P.2d 665 (Colo. 1982). Other states have adopted the Model Penal Code test for insanity under which a person is not responsible for his criminal conduct "if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." Model Penal Code § 4.01 (1985) See e.g. Conn. Gen. Stat. § 53a - 13 (rev. to 1991); State v. Torrence, 196 Conn. 430, 493 A.2d 865 (1985). Of course, numerous states, like amicus Pennsylvania, now also provide an alternative verdict of guilty but mentally ill, 18 Pa.Cons.Stat.Ann. § 314 (Purdon 1983).

[5]See e.g. Colorado which requires that once any evidence of insanity is introduced at trial, the burden of proof is on the People to prove sanity beyond a reasonable doubt. Colo. Rev. Stat. § 16-8-101 (1986); People v. Wright, 648 P.2d 665 (1982); cf. Leland v. Oregon, 343 U.S. 790 (1952) (upholding then widespread practice of requiring the defense to prove insanity beyond reasonable doubt).

responsibility a State applies, there is always a presumption of sanity. The defendant must interject the issue of his sanity into the proceeding.

Once an insanity defense is raised, the State unquestionably has a "legitimate interest in proving that the defendant's behavior appeared to be rational at the time of his arrest...." Wainwright v. Greenfield, 474 U.S. 284, 295 (1986). The trial court's statement in Galimanis -- that "all actions, words, conduct of the defendant are certainly relevant to the determination of the jury of sanity or insanity at the time of the events" (Pet. at p.6)--is a reflection of the universally accepted view in favor of admitting "all possible relevant evidence" on the difficult issue of insanity. United States v. Hartfield, 513 F.2d 254, 260 (9th Cir. 1975). Insanity, more than

any other defense, exemplifies the need, "when balancing the interests involved [to] weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." Michigan v. Tucker, 417 U.S. 433, 450 (1974).

The Colorado Court of Appeals' decision unnecessarily restricts the admissibility of relevant evidence through an improper and overly expansive reading of this Court's decision in Wainwright v. Greenfield, supra. For this reason, amici request that this Court grant certiorari.

ARGUMENT

A Prosecutor's Use of a Defendant's Request for Counsel, as Evidence of His Ability to Distinguish Right from Wrong, Does Not Deprive the Defendant of Due Process.

In People v. Galimanis, 765 P.2d 644 (Colo. App. 1988), the Court held that a new trial as to the sanity issue was required where the prosecution offered the defendant's assertion of his right to an attorney as probative of the defendant's sanity. The Galimanis majority held that this Court's decision in Wainwright v. Greenfield, 474 U.S. 284 (1986) "mandates reversal of defendant's sanity adjudication." Id. at 647. This reading of Greenfield treats evidence of a defendant's post - Miranda warning statements as equivalent to comments on a defendant's silence. This result is not mandated by Greenfield, is explicitly contrary to the approach taken

in the Greenfield concurrence, and conflicts with the decision of the State Supreme Court of amicus curiae Pennsylvania in Commonwealth v. Hunsberger, 523 Pa. 92, 565 A.2d 152 (1989), cert. denied, 110 S.Ct. 1124 (1990).

1. In Miranda v. Arizona, 384 U.S. 436 (1966), this Court held that the prosecution cannot use statements of an accused made during custodial interrogation unless the accused is advised, inter alia, of his rights to silence and counsel. In Doyle v. Ohio, 426 U.S. 610 (1976), this Court held that the silence of an accused cannot be introduced into evidence for impeachment purposes. Such a use would be fundamentally unfair given the fact that the Miranda warnings are an implicit promise "that silence will carry no penalty." Id. at 618.

Fundamental fairness also prohibits a prosecutor from arguing that a

defendant's post-Miranda-warnings silence constitutes evidence of sanity. Wainwright v. Greenfield, 474 U.S. 284 (1986). As concerns evidentiary use of a defendant's silence in a unitary trial, Greenfield controls. However, the Court made a sweeping statement that:

> What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized.

Id. at 295. This statement is dicta in the context of a defendant's exercise of the right to counsel.

Although the Greenfield decision turned upon the "breach [of] the officers' promise to [the accused] by using his post arrest, post-Miranda warnings silence as evidence of his sanity[,]" id. (emphasis supplied), the Court, in a footnote stated "that

silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." Id. at n.13. This statement, which arguably was not necessary to the outcome in Greenfield, is the genesis of the Court of Appeals' error in this case.

2. Two justices, then Chief Justice Burger joining now Chief Justice Rehnquist, found error in an analysis that assumes that "conduct and statements following the warnings, such as his requests for a lawyer, should be treated the same as silence." Id. at 297 (Rehnquist, J. concurring). The same error is present in the Galimanis decision.

Unlike silence, a request for counsel is not "insolubly ambiguous" and no inference of guilt arises from exercise

of the right to counsel. Id. at 297. A request for a lawyer "is a perfectly straightforward statement tending to show that an individual is able to understand his rights and is not incoherent or obviously confused or unbalanced. While plainly not conclusive proof of sanity, the request for a lawyer, like other coherent and responsive statements made near the time of the crime, is certainly relevant." Id.

Admitting evidence of an accused's request for a lawyer is not fundamentally unfair:

> Nor does the "unfairness" prong of Doyle, based on the implicit assurance in the Miranda warnings that "silence will carry no penalty," bar prosecutorial comment on respondent's requests for a lawyer... The logical corollary of this warning--that what respondent does say can be used against him--is that what he does not say cannot.

Id. at 298. No penalty flows from the use of the accused's request for counsel to show his knowledge of right from wrong.

The important distinction between evidence of silence and evidence of a request for counsel recognized by the concurrence was not determinative in Greenfield. Instead, the prosecutor's comments on the defendant's silence required a new trial.

3. This distinction was key to the decision in Commonwealth v. Hunsberger, 523 Pa. 92, 565 A.2d 152 (1989), cert. denied, 110 S.Ct. 1124 (1990). To rebut Hunsberger's insanity defense, the prosecution intended to offer statements made by the defendant after he received Miranda warnings in which the defendant sought "to elicit information regarding either his attorney or the obtaining of an attorney." Id. at 97, A.2d at 155.

Characterizing the statements as voluntary and spontaneous, the Pennsylvania Supreme Court considered the applicability of Wainwright v. Greenfield:

> It is clear that the common thread which runs throughout Wainwright is emphasizing the silence of the defendant or of his exercise of that right. In the case before us, however, we are not faced with Appellee's silence, but with his comments made following the invocation of his right to remain silent.
>
> * * *
>
> The statements in question ...cannot remotely be indicative of the Appellee's intent to remain silent. They are neither utterances which in and of themselves can be deemed inculpatory, nor were they elicited by questions solicited by authorities following Appellee's expression of his intent to invoke his Fifth Amendment rights.
>
> It is only statements which directly bear upon that right...which are safeguarded by the Fifth Amendment and Wainwright.

Id. at 95-97, A.2d at 154-55. The Pennsylvania Supreme Court reversed the

order which suppressed the defendant's statements about access to counsel.

Pennsylvania's Supreme Court is not alone in its view that Greenfield does not bar evidence of a request for counsel. See State v. Mauro, 159 Ariz. 186, 766 P.2d 59 (1988) (defendant's request for attorney during court-ordered psychiatric examination was admissible as evidence of sanity).

4. These States have properly considered and resolved the issue in favor of the admissibility of what Justice Rehnquist denominated "highly relevant" evidence. Greenfield, supra, at 297 (Rehnquist, J., concurring). Admission of an accused's statement seeking counsel does not penalize the accused, but suppression penalizes the State by precluding use of probative evidence. The Colorado Court of Appeals applied Greenfield too expansively and

without regard to the strong public policy favoring reliable and just determinations of sanity. As the Court in Hunsberger opined:

> the key to maintaining the rights bestowed upon citizens by the Constitution is applying them in a manner which does not allow them to be a shield for conduct not contemplated or which is merely tangentially related.

Commonwealth v. Hunsberger, 523 Pa. 92, 96, 565 A.2d 152, 154. The Colorado Court of Appeals' decision conflicts with this principle.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 90-1678

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

THE STATE OF COLORADO,
Petitioner,
vs.
PHILIP LESLIE GALIMANIS,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

On Certiorari to the Colorado Court of Appeals
Court of Appeals No. 84CA0809

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TABLE OF CONTENTS

PAGE

ARGUMENT 1

A. THIS CASE RAISES THE SIGNIFICANT QUESTION OF WHETHER AN ACCUSED'S REQUEST FOR COUNSEL IS ADMISSIBLE WHERE IT IS THE ONLY EFFECTIVE MEANS BY WHICH THE STATE CAN SHOW THAT HIS POST-ARREST BEHAVIOR WAS INCONSISTENT WITH HIS CLAIM OF INSANITY. 1

B. THE BIFURCATION OF THE PROCEEDINGS IS AN EXTREMELY SIGNIFICANT FACTOR NOT PREVIOUSLY CONSIDERED IN A PERTINENT DECISION BY THIS COURT. THIS BIFURCATION RESTRICTED THE USE OF DEFENDANT'S SILENCE TO A PROCEEDING WHERE SILENCE DID NOT PREJUDICE HIM, THUS RENDERING ANY ERROR HARMLESS. 4

CONCLUSION 5

APPENDIX A 7

APPENDIX B 9

TABLE OF AUTHORITIES

CASES	PAGE
Doyle v. Ohio, 426 U.S. 610 (1976)	2, 4
People v. Galimanis, 765 P.2d 644 (Colo. App. 1988)	4
Wainwright v. Greenfield, 474 U.S. 284 (1986)	2, 4

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ARGUMENT

A. THIS CASE RAISES THE SIGNIFICANT QUESTION OF WHETHER AN ACCUSED'S REQUEST FOR COUNSEL IS ADMISSIBLE WHERE IT IS THE ONLY EFFECTIVE MEANS BY WHICH THE STATE CAN SHOW THAT HIS POST-ARREST BEHAVIOR WAS INCONSISTENT WITH HIS CLAIM OF INSANITY.

This case illustrates the unfairness of precluding the prosecution from using a defendant's request for counsel to respond to an insanity defense in which an accused

unquestionably places his demeanor in evidence. It also illustrates how the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976), needs modification in the sanity context. Without such modification defendants have license to construct theories of insanity in which both bizarre behavior and compliance with authority are represented as mindless. Accordingly, this case affords this Court a unique opportunity to right the inequity that allows defendants unrestricted use of their demeanor to support theories of insanity while preventing the prosecution from using highly relevant evidence of sane, rational conduct. *See Wainwright v. Greenfield*, 474 U.S. 284 (1986) (Rehnquist, J., concurring).

There are no procedural or factual obstacles to review by this Court. The distinction between the right to counsel and the right to silence articulated in the concurring opinion in *Greenfield*, was raised in the state supreme court (*see* Appendix A attached hereto). Similarly, the highly technical definition of "rebuttal" which applies in guilt trials where defendants are presumed innocent has no significance in a Colorado sanity proceeding where defendants have the initial burden of presenting evidence of their insanity. And, contrary to respondent's belief, respondent did produce evidence regarding his demeanor in custody after his arrest (*see* Appendix B attached hereto).

This case perfectly illustrates the inadequacies of *Greenfield* and the need for review by this Court. In *Greenfield*, the majority held that "carefully framed questions" which circumvent an accused's assertion of constitutional rights could serve the state's legitimate interest in showing that an allegedly insane defendant behaved rationally after arrest. *Id.* at 295. Here, however, there was expert testimony indicating that the "structured setting" of official custody alleviated the "symptoms" of

respondent's insanity (*see* Appendix B). Thus, police testimony which simply showed an ability to recognize persons, understand directions, or converse, did not adequately show respondent's sanity after arrest. Unlike mere coherent speech or correct perception, a defendant's request for counsel shows his cognitive ability to recognize he is in a serious predicament from which he needs to extricate himself. Here, it showed that instead of being a mindless automaton who simply recognizes authority and follows directions, respondent was a sane and rational person capable of understanding and asserting his need for legal assistance.

The issue presented here is essential to a fair and reliable determination of insanity claims where the accused relies extensively on demeanor evidence. Such cases are not unique to Colorado. Nineteen other states have joined in an Amicus Brief asserting that this issue is of such paramount importance that it is deserving of this Court's attention.

B. THE BIFURCATION OF THE PROCEEDINGS IS AN EXTREMELY SIGNIFICANT FACTOR NOT PREVIOUSLY CONSIDERED IN A PERTINENT DECISION BY THIS COURT. THIS BIFURCATION RESTRICTED THE USE OF DEFENDANT'S SILENCE TO A

PROCEEDING WHERE SILENCE DID NOT PREJUDICE HIM, THUS RENDERING ANY ERROR HARMLESS.

This case presents the unique question of whether bifurcation rendered harmless any constitutional error relating to mention of silence at a sanity trial. *See People v. Galimanis*, 765 P.2d 644 (Colo. App. 1988), Metzger, J. dissenting, at 650. The *Greenfield* case involved a unitary proceeding where the jury which found the accused sane also could have considered his silence as suggestive of guilt. Accordingly, this case affords this Court a unique opportunity to consider whether *Greenfield* actually advances the due process interests of defendants in states which provide bifurcated proceedings or whether it has the opposite effect by discouraging bifurcation.

At the sanity proceeding below, the state properly recognized that silence had virtually no probative value for the prosecution. Accordingly, the prosecution emphasized respondent's request for counsel, not his "insolubly ambiguous" silence. *See Doyle v. Ohio*, *supra*. Moreover, in the context of this sanity trial, mention of silence could not prejudice the insanity claim of respondent who purportedly functioned in a "waking dream" with occasional withdrawal from conversation with others (*see* Appendix B).

Once again, these issues are not unique to Colorado. Twelve other states provide bifurcated proceedings for insanity pleas (Pet. for Cert. n.2 at 9). These thirteen states need specific guidance from this Court regarding the constitutional significance of separate sanity and guilt proceedings.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Pertinent Portion of State's Reply Brief in Colorado Supreme Court

In addition, defendant's first assertion[2] of Miranda rights immediately after his arrest was not an invocation of his right to remain silent in the face of *investigative* questioning by the police. Rather, this assertion followed a police question about the presence of a weapon (v. 9, p. 164, 11. 17-22). Such non-investigative questions are permitted under a public safety exception to the Miranda requirement. *New York v. Quarles*, 467 U.S. 649 (1984). Defendant's response to this particular non-investigative inquiry was thus outside the purview of *Wainwright v. Greenfield* and did not constitute an invocation of the right to remain silent which would be inadmissible in a sanity proceeding. *See Commonwealth v. Hunsberger*, 565 A.2d 152 (Pa. 1988). First, there is no implied promise that a response to police inquiries under the public safety exception to the *Miranda v. Arizona*, 384 U.S. 436 (1966) will never be used in any proceeding. *See Quarles, supra*. Second, defendant's assertion of his right to counsel was not even responsive to the officer's question which sought information for public safety, not investigative purposes. **Rather, it was a spontaneous, unelicited statement regarding *counsel, not silence* and as such, its admission was not barred by *Wainwright v. Greenfield*. See *Hunsberger, supra*.** If this statement had come in response to a question which asked defendant whether he wished to answer investigative inquiries, a *Wainwright v. Greenfield* analysis

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[2]There were two Miranda assertions, one to Officer Keiser shortly after arrest and one to Detective Light some time later that same morning (v. 12, pp. 162-164, 218-219).

would properly apply. However, *Wainwright v. Greenfield* is properly inapplicable to spontaneous or non-responsive assertions which do not serve to terminate *investigative* questioning. *See Hunsberger, supra.*

(emphasis added).

APPENDIX B

Pertinent Testimony of Dr. Steven Miller

Q Are there times, though, that a person who experiences psychoses can go back into reality or does a person in this state always maintain those kinds of out-of-touch-with-reality situations?

A Well, a lot of what goes on in life you can handle with a very tenuous hold on reality, a very slim hold on reality. Much of what we do is not important in terms of getting you through the day.

For example, it has been reported to me by the jailer, one of the jailers, that at times it appeared to him that Mr. Galimanis was functioning well in the jail. Okay. How do you explain that? If this guy is having this waking dream, how in heavens can you explain it?

The way I like to say it is this: Suppose you are standing there. I give you one ball. I say throw the ball up in the air. Okay? So you start tossing the ball up and down and then I say, okay, here's another ball, catch it. Now you've got two balls. Then I toss another ball to you. Before you know it, there's three, four, five balls. They're all over the place. They're bouncing off the walls. These people cannot juggle. They cannot get themselves into a place in which they can get more than one, two balls going at a time.

When this fellow is in jail, he has no balls to juggle. They say get up. They say sit down. And by the way, even when they tell him to get up, most of the time he won't. For example, the second time I went to see him he wouldn't get up to be examined by me for over an hour, and finally agreed to come out and visit with me.

So they say go to sleep, wake up, here's your meal, there's the bathroom. I mean, this is what I would consider not having very many balls to juggle, but the

minute you start throwing another ball, which is what happened in the psychiatric interview, make sense of the world for a minute, tell me how you feel, here's another ball for you, what about this, what about that, and then you see him begin to disintegrate. His ability to keep all of these things going at one time disappears.

Q Okay. So it would be your opinion, then, that being in a structured setting such as the jail wouldn't necessarily -- might help the symptoms that are associated?

A That's right. If you give somebody one ball, they're throwing it up and down, you say, boy, can that guy juggle, but it's when you are required to handle life, all the various things going on at the same time that we say that you are able to handle reality or not.

CERTIFICATE OF MAILING

I, Gale A. Norton, a member of the bar of this court, herewith certify that the within REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI has been deposited in the United States Mail, first-class postage prepaid, addressed to Mr. Joseph Spaniol, Jr., Clerk of the Court, Supreme Court of the United States, Washington, D.C. 20593 and that to my knowledge the mailing took place on June 17, 1991, within the permitted time for filing the brief.

GALE A. NORTON
Attorney General

Subscribed and sworn to before me in the County of _____, State of Colorado, this _____ day of _____, 1991.

_____
NOTARY PUBLIC

My Commission expires:

_____

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 17th day of June, 1991, addressed as follows:

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